



Indian Water - 1997 Trends and Directions in Federal Water Policy

A Summary of the Conference
Proceedings

Todd Olinger
Boulder, Colorado

**Report to the Western Water
Policy Review Advisory Commission**

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Introduction

Under the Western Water Policy Review Act of 1992,¹ Congress directed the President to undertake a comprehensive review of federal activities in the nineteen western states which directly or indirectly affect the allocation and use of water resources—whether surface or subsurface—and to submit a report of findings and recommendations to the congressional committees having jurisdiction over federal water programs.² Pursuant to this Act, the twenty-two member Western Water Policy Review Advisory Commission (Commission) was formed.³ The Commission is composed of ten members appointed by the President (including the Secretaries of the Interior and the Army) and twelve members of Congress serving ex officio by virtue of being the Chairmen and ranking minority members of six Congressional committees and subcommittees.

The purpose of the Commission was to perform a two-year comprehensive review of federal activities in the nineteen western states regarding the coordination of federal and local water policy objectives. The legislation authorizing the Commission noted that at least fourteen federal agencies have water-related responsibilities, resulting in "unclear goals and an inefficient handling of the Nation's water policy."⁴ The legislation also noted that the conflicts between competing goals and objectives of federal, state, and local agencies and private users are particularly acute in the nineteen western states.⁵ In particular, Congress noted that the federal government recognizes its "trust responsibilities to protect Indian water rights and to assist tribes in the wise use of water resources."⁶

As part of its legislative mandate, the Commission held a series of meetings and workshops across the west, compiling reports and testimony that will become part of the record of the Commission. This document summarizes the proceedings of the Commission's meeting in Phoenix, Arizona on March 17-18, 1997. The meeting, titled *Indian Water 1997, Trends and Directions in Federal Water Policy: Implications and Opportunities for Tribal Action Forum*, was organized for the Commission by Richard Trudall, the Executive Director of the American Indian Resources Institute. During the meeting, the Secretary of the Interior, tribal leaders, government officials, and Indian water law experts identified trends in the federal government's approach to protecting tribal water resources, and then proposed recommendations for improvements in federal policy in this area.

This report is intended to provide the reader with the essence of the meeting in a condensed format. The Secretary of the Interior's and the keynote

¹ Pub. L. 102-575, Title XXX, §§3001-3010, 106 Stat. 4693-4698 (codified as amended in scattered sections of 43 U.S.C.).

² Pub. L. 102-575, Title XXX, § 3003(a).

³ Pub. L. 102-575, Title XXX, § 3004.

⁴ Pub. L. 102-575, Title XXX, § 3002(5).

⁵ Pub. L. 102-575, Title XXX, § 3002(6).

⁶ Pub. L. 102-575, Title XXX, § 3002(9).

speakers' formal addresses are provided verbatim. Other speeches and questions, answers, and general comments over the two days have been summarized. The author has expended significant effort to ensure that the substance of all such comments are clearly represented in this work.

The complete transcript is 240 pages in length and will be preserved as a permanent record of this meeting.

Session I: Western Water Trends and Directions

Tribal Water Issues and the Changing Policy Landscape

David H. Getches⁷

Protection and stewardship of tribal resources depends on knowing the political landscape as well as the natural landscape. Water is a resource that defies geographic boundaries—reservations, state, or national. Thus, understanding hydrology and geology—the physical landscape—is essential. And since water is a public resource subject to private rights, it belongs to everyone. Everyone has a stake in water decisions. And as public and private values in water change, so too does the policy landscape. Successful tribal water management today, of course, means having expertise in the science of hydrology. Likewise, it means having expertise in water policy. To care well for water, and to get the fullest benefit from it, requires that tribal leaders understand what others seek to do with the same resource. They also need to stay aware of the pressures on public policy affecting water. The pressures for change have never been greater.

Hydrology has developed and evolved gradually, as science usually does, building logically as new knowledge accumulates. Water policy, however, has developed differently. The prior appropriation doctrine in the west developed in response to economics and social conditions. It was invented to meet the needs of miners. In the mountains of northern California it was necessary to take water long distances, to get it from lands that were owned by the federal government, and have some certainty that no one else would take it. The prior appropriation doctrine was created to fill the bill. Then the doctrine was adapted to meet the needs of settlers moving west. Farmers, as well, found it useful to be able to transport water to lands that were away from the stream. They needed the certainty that the "first in time, first in right" rule gave them to secure their investments. All that was required for a water right was to take the water—to divert it from the stream.

Sporadic changes were made in the prior appropriation law to accommodate new circumstances. For instance, there was a need to lock in a water right to attract the investments needed for dams and canals that took many years to build before water could actually be diverted from the stream and put to use. So an exception was made to the apparently fundamental diversion requirement. Such changes were episodic, and most responded to a

⁷ Raphael J. Moses Professor of Natural Resources Law, University of Colorado School of Law, Boulder, Colorado.

utilitarian ideal that water should be used as fully as possible to produce wealth. That was the ethic of society in the West in the mid-nineteenth century.

Now, in a surge of activity, western water policy is changing in a number of ways. It is fair to say that there never have been so many changes and complications in water policy as we are experiencing today. The policy revolution started in the 1980s, and continues apace today.

My message is that there is a west-wide revolution in water policy and that tribes are part of it. Moreover, for tribal survival, tribes must understand their role in the revolution, its potential for tribal survival and success, and ultimately, how to take a leadership role in the trends that characterize western water policy as we approach the twenty-first century. These trends are:

- conservation and efficiency in water use,
- a different future for structural solutions,
- water marketing,
- environmental protection and sustainability, and
- institutional reform.

These trends are driven by two powerful and inexorable forces in the new West: demographics and attitudes.

The demographic changes in the West today are more dramatic than those in any other period of the nation's history—even more than the big shifts that occurred with the opening of the West, with homesteading, and with the post-World War II boom. We have now passed the tipping point, and more than half the population in the nation is located west of the Mississippi. The West is, indeed, the most urbanized region in the country, with a greater proportion of people concentrated in cities than in any other part of the country. The movement to the cities is emptying out much of rural America.

As these growing, thirsty cities search for new water supplies, they are creating unprecedented pressures on rivers and streams. Furthermore, a nation with a proud agricultural tradition now finds itself in the midst of surpluses and is asking how to produce less food. Agricultural water is worth comparatively much less than municipal water, and so it is being targeted by the cities as a ripe source.

The same streams and lakes that supply the cities are coveted as playgrounds. They make the West what it is (or certainly what it historically was), and westerners want to be near water in its natural state. This

demand for flowing water plus the demand to move more water to urban uses create an enormous tension: The urbanized westerner wants water for lawns and hot tubs, but also for fishing and river rafting.

Attitudes are changing in the West as well. No longer is the "typical" western attitude one of wanting to exploit all resources for their most utilitarian potential. There is a growing appreciation of ecological realities. The idea of the interconnectedness of all things is no longer strange, and even four-dollar words like "sustainability" and "ecosystem" are part of regular conversation in the West.

Once, a conference on Indian water rights could be spent exploring the history, nuances, and latest developments in the *Winters* doctrine. We still care about those things, but as the agenda for this forum indicates, our focus is on the future, on "trends and directions." There is a constantly changing policy landscape that must be studied and understood. So let's look at the trends in western water policy that I outlined and see what they mean for the new West and, in particular, how they implicate Indian tribes.

Conservation and Efficient Water Use

All of western water law under the prior appropriation doctrine is premised on the concept of beneficial use. The flip side of beneficial use is waste. Rights to use water depend on putting it to beneficial use. Thus, there can be no right to waste water under our system of laws.

As notions of waste and inefficiency change, so does the concept of beneficial use. A use that qualified as "beneficial" at the turn of the century may now seem wasteful. Tightening the standards that states use to define waste—and denying new water rights to the extent that proposed uses do not meet standards of efficiency—is increasingly likely. Even old water uses, long ago established as beneficial, but no longer efficient given modern technology, may be vulnerable. And there is an incentive for water users to police one another to ensure that the resource is being used wisely; if senior rights are pared down to eliminate inefficiency or waste, more water will become available for junior users.

Once, any economic use was considered "beneficial." Today, states are looking harder at uses, old and new, and asking: "Are they truly beneficial?" "Is the use really efficient?" "Is the means of diversion reasonable and appropriate?"

For tribes denied water from a stream where there are established non-Indian uses, it may be appropriate to urge, even in state agencies and courts, that such uses be confined to the amounts of water that would be necessary,

if efficient diversion works were used and reasonable uses were made of the water. If water is freed up from non-Indian uses by enforcing the beneficial use requirement, more may become available to satisfy tribal needs, from fisheries to farms. Tribes have a right to insist that uses be reasonable and beneficial in the state system and to help bring the state systems into the Twenty-First Century—or at least, into the Twentieth.

Structural Solutions: Tribes Need Water Facilities

It is often said that we have reached the end of the big dam era. I would be surprised if the Western Water Policy Review Advisory Commission publishes a report without saying just that. While the statement is generally true, there are exceptions to the conclusion that the nation is finished building dams. Indeed, before policy makers totally dismiss structural solutions to water supply problems, tribes might well say: "Not so fast!"

The tribes' place in most of the trends in western water policy is squarely in the mainstream—as participants and leaders. When it comes to water facilities, tribes are in a different position: they are the exception. Unlike western irrigators or cities all over the nation who benefit from water developed, treated or distributed with the assistance of federal financing, unlike shippers using federal locks and dams, and unlike populations protected by federal flood control facilities, tribes by and large have been left out of the nation's water development largesse. While the rest of the nation was dipping into the pork barrel, the tribes stood by and saw the barrel repeatedly refilled with tribal water.

Not only were the tribes denied most of the benefits of the nation's water development programs, their water was used to fill the dams and canals built for non-Indians. The National Water Commission recognized this 24 years ago. Its report concluded:

Following Winters, more than fifty years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this fifty-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that the policy was pursued with little or no regard for Indian rights and the Winters Doctrine. With the encouragement, or at least the cooperation, of the Secretary of Interior—the very office entrusted with all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered on Indian reservations, sometimes above, more often below the reservations.

With few exceptions, the projects were planned and built by the federal government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters for the projects.⁸

Thus, much western water development has occurred at the expense of tribes. So the tribes have involuntarily subsidized non-Indian development of the very streams claimed by them. It was for this reason that the National Water Commission concluded that, "In the history of the United States government's treatment of Indian tribes, its failure to protect Indian water rights for the use of the reservations it aside for them is one the of the sorrier chapters."⁹

Today, tribes cannot make a convincing case that Congress should spend obscene amounts of money to build big, lavish, and wasteful projects on their behalf. But they do have a strong, equitable case for serious consideration of their needs for construction funds. Many tribes lack adequate or potable drinking water supplies. On some reservations, only non-Indians get the benefit of so-called Indian irrigation projects. In most of Indian country there are no irrigation projects at all. To develop tribal agricultural water would be to give reality to the tribes' paper claims to water.

Of course, delivery of wet water to tribes could cut into the supplies for non-Indians who have junior rights, especially in dry years. Is this a reason not to proceed with projects for tribes? We must ask whether a senior non-Indian appropriator would hesitate to develop and use water just because it would harm the value or reliability of a junior appropriator's supply? Of course not. So why should the United States—the trustee for Indian land and water—hesitate to give value to Indian water rights because it would lessen the value of non-Indian water uses? It is contrary to the way non-Indian appropriators think about developing and using their rights, and it is contrary to the fiduciary obligations of the government to Indian tribes to hesitate to develop Indian water just to protect junior water rights holders.

In some cases, tribes can also benefit from existing federal water development—obviating the need to build new projects. There is a trend toward reoperating and re-tooling existing facilities to accomplish new purposes, such as fish and wildlife and recreation. As the Bureau of Reclamation and other federal agencies consider how to make uses of projects that were not contemplated when the projects were built, solving Indian water problems should be high on their list of possible new uses. These facilities were built for a different era, but they now have the potential

⁸ See U.S. National Water Commission, *WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 474-75* (1973).

⁹ *Id.*

of being useful to tribes. Water can be released from them for all kinds of reservation uses, including agricultural, municipal, and industrial. Moreover, instream flows can be maintained to protect and perpetuate a tribal fishery. Power can be generated and the revenue made available to tribes. All of these devices need to be considered as we have second thoughts about how the existing big federal water projects ought to be operated and used in the future.

Water Marketing

Fiscal conservatives and environmentalists have joined in urging that water be subject to market forces. They argue that some of the problems of economically inefficient use of water can be solved if water that is in excess of present needs of one user is leased or sold to others who are willing to pay to use it now. A farmer will not continue using six acre-feet per acre of irrigation water if he or she can raise the same crops with four acre-feet per acre and sell the other two acre-feet to a nearby city for cash.

For some tribes, water marketing can offer the possibility to achieve significant financial returns, where now they receive little or none from their water resources. Consider a tribe that uses, or allows a non-Indian lessee to use, water to grow crops on marginal reservation land, receiving little in return for it. Or consider the tribe with great water rights claims but with no facilities to deliver water to the reservation. If the tribe can sell, on an annual basis or for a longer term, the right to use water off the reservation, it could return a bounty to the tribal treasury to be used for tribal needs. Of course, the decision to trade water for money can be soundly rejected if the water is needed for cultural or spiritual purposes, or if the tribe needs it to support the reservation's economic base.

Virtually all of the dozen most recent Indian water settlements have some provision allowing *limited* water marketing. This gives tribes the option of using some of their water on or off the reservation. It gives them the benefit of their water rights whether or not they have an immediate need for on-reservation use. But, I must ask why these water marketing rights in the settlements have been so limited. Non-Indian water rights under the prior appropriation doctrine are *always* transferable. That is inherent in the water right. Tribes are told to play by the rules, to quantify their water rights and determine priority dates in state court, to fit their rights into the prior appropriation system. Then, when they do quantify them in a settlement, Congress attaches conditions to reduce the value of their rights by making some or all of them non-transferable.

There is simply no principled basis for limiting the leasing or other transfer of Indian water rights, while every other water rights holder in the West can

move water around freely to the extent that no other water rights holder is injured. No one pretends that this limitation in settlements is for the protection of tribes or future generations of Indians. Tribes, after all, are capable of deciding whether, and for how long, to let their water be used by others. To prohibit them from doing so leaves Indian water unused in many streams, so that it can be used for free by non-Indians. At best, limits on tribal water marketing are a ruthless means to attain an economic advantage; at worst they constitute racial discrimination.

It is surely time for tribes to consider profitable arrangements for getting the benefit of their solid share of rights to western water. Leasing and marketing can then be added to the tribal toolbox of options. This process holds the potential to bring tribal economic experts and businesspeople to the table to compete for the advantages and values that their resources hold. But to make this option a reality and to open the door to western water markets for tribes, a basic inequity must be removed.

Isn't it also time to enact legislation allowing tribes the sovereign and proprietary authority to lease their water for on or off-reservation uses for a set term? Tribes have long had authority to lease their lands, subject only to secretarial approval. Why shouldn't water rights be treated the same way?

Environmental Protection and Sustainability

The sorry state of the nation's rivers and aquatic systems is a notorious tragedy. Much of it is the result of water uses and water facilities that were enabled by laws and policies that allowed degradation of quality, damming and other obstructions, and depletion of flows. The northwest salmon crisis, for instance, was created by all these causes.

For tribes, the ecological crisis caused by water pollution and development is compounded. The fishing tribes have seen their economic livelihood and cultural core destroyed. Reservations like Fort Berthold and others were inundated for the benefit of the barge industry and irrigators far away. In all, five of the Missouri River mainstem dams in North and South Dakota destroyed 550 square miles of Indian reservations and displaced more than 900 reservation families. The Fort Peck dam in Montana displaced 350 families. So much water was drawn away from Pyramid Lake that its legendary fishery, part of the Paiute's culture, was pushed to near-extinction. In case after case, federal money was spent to subsidize non-Indian development and wreak damage on Indian tribes.

It is in the tribes' interest to reverse this history of habitat destruction and realize the potential of their resource base as guaranteed in treaties and inherent in the nation's promise that they would have reservations that could

be perpetual homelands. A treaty that promises a fishing right implicitly promises enough water of sufficient quality to sustain a fishery.

The Endangered Species Act (ESA) has emerged as one of the West's primary water laws. Of course, it is not a "water law" in the usual sense. In fact, however, it determines the fate of water development as decisively as any state's water law. It can force a federal dam to change its operations to protect endangered salmon. It can stall a project planned to develop tribal water, in order to ensure that the habitat of endangered fish is spared.

In some cases, the Endangered Species Act can be a tool for protecting tribal treaty rights. In others, it may be an obstacle to realizing tribal rights. The goal should be to discover ways in which the ESA can be used to a tribe's benefit, and to insist that the federal government not apply it in ways that cast unfair and inappropriate burdens on the tribes. What happens when an endangered species can be preserved in a variety of ways? For instance, species preservation may present a choice between curtailing non-Indian diversions and preventing a tribe from developing its senior water right? It seems reasonable to anyone who understands the trust relationship in Indian law (not to mention a senior call on the water) that tribal rights must have first call on the government's loyalty. Typically, however, tribes—lacking political clout—got their opportunity to develop water later than their non-Indian neighbors. They should not be disadvantaged by this injustice of history. The rule should be: a reasonable exercise of Indian senior reserved water rights will not be curtailed by the ESA until all reasonable opportunities to limit non-Indians with junior rights have been exhausted.

Tribes have an obligation to preserve species, of course. But they should be held to their just share of solving the problem, an obligation proportional to their contribution to the problem relative to the others' contributions.

The notion of sustainability is increasingly accepted by policy-makers. Human uses that touch the land gently and respectfully are now preferred in discourses over resource use. There is a recognition that humans are part of ecosystems—participants, harvesters, and protectors. No longer do most enlightened people think that it is legitimate to exploit resources without regard to the consequences. This widespread awareness suggests some intersection with the traditional values of many tribes. There is a tendency, however, to capture and define the idea of sustainability as if it were created on Earth Day and to fail to realize the tribal roots and understanding of this issue. In a national partnership with tribes, the ideal of sustainability, including protection of endangered species and all the rest of our nation's resources can be genuine, reciprocal, and beneficial to all.

Institutional Reform

The trend in water law throughout the West is away from rigid rights and strict enforcement and toward improved management. The tribes' role in this trend is significant. Tribal control (local control) of water also fits with the ideal of watershed management. Tribes participate at this level as well.

It is a fundamental tenet of Indian law that Indians can control the people and territory within their reservations. In the exercise of sound stewardship and their sovereign powers, tribes enact and enforce water codes. Unfortunately, the approval of these codes by the United States government has been stalled by a moratorium that has been in effect since June 1975. More than two decades ago, a few western states successfully put political pressure on the Department of the Interior, and the moratorium they achieved persists today. The moratorium responded to the concerns that tribes would manage water in ways that were contrary to the interests of non-Indian water users. Tribes themselves may be able to overcome the moratorium problem without a change in federal policy. They can simply amend their tribal constitutions to remove the requirement of secretarial approval of those codes. The Secretary apparently will approve this amendment. Does this mean that there is no policy problem? There *is* a policy problem so long as the trustee reaffirms, year after year, by its inaction, that it will not approve tribal water codes. Maybe this refusal does not rise to the magnitude of a breach of trust, but it is at least a timid politically response. It ignores the contributions that tribes can make to the overall improvement of water management in the West.

Many tribes have adopted laws that enable them to control water quality as allowed under the federal Clean Water Act. History will record with favor the steadfast insistence of the Isleta Pueblo that the city of Albuquerque treat its sewage, and the efforts of the Salish and Kootenai tribes of the Flathead nation to preserve the purity of Flathead Lake. These are not excesses or unreasonable assertions of tribal authority, but exercises in sound stewardship and other tribes should follow their examples. I presume that the Supreme Court will uphold the EPA's approval of the Isleta water quality program.

The interconnectedness of what happens throughout a watershed from headwaters to estuaries and from peak to peak is being reflected in a trend throughout the West. The trend is toward watershed management. People within drainages are joining together to solve their own water problems. Tribes, when given the opportunity, have well-managed entire drainages encompassed within their reservations. The Warm Springs effort at integrated resource management—management of all resources in the reservation environment for generations into the future, is a good example.

The greater recognition of the role of watersheds is pervading all of water law and policy. These efforts are informal, mostly outside government frameworks. They are processes that work from the grassroots up. Most importantly, they have proved capable of solving some complex problems that state and federal governments had not effectively addressed. Where tribes have been involved in these efforts they have made a signal contribution. For instance, on the Zuni River, a lawsuit was settled by creating a fund for the Zuni tribe to rehabilitate land in the Zuni watershed. The tribe realized that it needed the cooperation of state and private land owners upstream in the same watershed. They enlisted that cooperation, and today there is an Indian-non-Indian, public-private, cooperative effort to improve the watershed. It is succeeding with tribal leadership. Another example arises on the Jicarilla Apache Reservation, where the tribe has participated in the Rio Puerco Management Committee to solve non-point source problems in that watershed. These are just two of the many examples that can be drawn from around the West. They demonstrate tribal leadership, working at the forefront of the revolution in western water policy by participating in new institutions.

In each of the policy areas I mentioned—water conservation, structural solutions, marketing, environmental protection, and institutional reform—tribes are implicated. They can and should take their place as participants and leaders. The revolution is about tribes and tribal water as much as it is about the future of the West.

State Basin-Wide Adjudications: The Impact on Tribes

Susan M. Williams¹⁰

Today I would like to comment on the state general stream adjudications. First, though, I would like to make a couple of points as a backdrop for that discussion. One is that there is very important federal trust responsibility at issue here, but the trust responsibility is not well-defined. Where did it come from? Federal trust responsibility to Indian tribes dates from a very early United States Supreme Court decision from an early 1800s case called *Cherokee Nation v. Georgia*.¹¹

In *Cherokee Nation*, the United States Supreme Court outlined the federal, tribal and state relationship under the United States Constitution. In outlining the relationship between tribes and states, the Court held tribes and states to be separate sovereigns, with the tribes deriving their sovereignty from their inherent sovereignty existing since time immemorial and the states deriving their sovereignty from the United States Constitution. Moreover, the Supreme Court said that the United States Government must serve as a guardian and a ward in its relationship with Indian tribes. In a very interesting decision from a legal point of view, the Supreme Court held that when the United States conquered territory from Indian tribes around the country, the United States essentially took the underlying fee title to the Nation's land as a way of divesting other sovereigns from any sort of ownership or proprietary entitlement to this country. By taking fee title to all of this country, the United States undertook an obligation with respect to Indian tribes to protect them in their uses of their land. Finally, the United States took on the role of being the sole government empowered to deal with Indian tribes.

As such, the State of Georgia was held to have no power, whatsoever, in the Cherokee Nation Reservation absent Congressional consent. In its decision, the Supreme Court said the United States, in its guardian/ward relationship, has a general trust responsibility to preserve and protect tribal land, and—I would argue—to protect tribal sovereignty over tribal lands. The United States, in its relations and treaties with Indian tribes, took on that guardian/ward obligation to protect that tribal character as well as to protect the tribes' right to own and possess water.

Well, it wasn't for many years—in fact, until the 1980s—that the United States Supreme Court really described the Federal government's trust responsibility in more detail. There have been a number of cases over the

¹⁰ Attorney at Gover, Stetson & Williams, P.C. in Albuquerque, New Mexico.

¹¹ 30 U.S. 1 (1831).

years in which the United States has been held liable in the United States Claims Court for a breach of trust because it failed to protect Indian water rights. But there have not been many cases in this jurisprudence, except where an Indian tribe (in Arizona, for example) had been using water for a farm project and then upstream juniors started developing their farms and taking that water. Here the United States has been liable in money damages for breach of trust, for failure to stop those upstream diversions that had caused the tribal farm project to go under.

But over the years there have only been a couple of cases in the Claims Court on this subject. It was not until the early 1980s that the U.S. Supreme Court asked and answered the question, "under what terms and conditions will the United States be liable for a breach of its trust responsibility to Indian tribes?" It did so in a set of companion cases called *United States v. Mitchell*.¹²

In those cases, the Supreme Court held that in order for the United States to be liable in money damages, there has to be an obvious waiver of the United States' sovereign immunity from suit, even if there is a claim that the United States breached its duty to the Indian tribes to protect their water rights or their water resources.

The United States Supreme Court further held that the Tucker Act, which is the general statute for the Claims Court itself, isn't a sovereign immunity waiver. Instead tribes must look elsewhere to see whether the United States, regardless of the fact that it has a fiduciary duty, intends to allow itself to be sued for breach of its duty.

In *United States v. Mitchell*, the Supreme Court held that since the United State is general trustee to Indian tribes, if there is a trust that we can demark or describe, then there is going to be relief in monetary damages where the United States has breached that trust. Well, then how do we know that there's a trust that gives rise to monetary damages?

The Supreme Court gave two answers: Monetary damages are appropriate when Congress expressly addresses the breach of trust and Federal liability for monetary damages in a statute, or where the United States undertakes virtually daily supervision of the tribal trust asset. In the latter instance, if the U.S. mismanages the tribal resource, it will be liable in monetary damages for breach of its trust.

So I think it's very important for this Commission to address, head-on, the United States' trust responsibility to preserve and protect Indian water rights, because there is monetary damage relief hanging out there for failure

¹² 463 U.S. 206 (1983).

to do so. I think it is an important policy matter for the United States, as much as it is important to Indian tribes and other citizens that depend on the water resources, to have Indian water resources protected.

One other initial point I want to emphasize—not only as an attorney who represents tribes in the water cases, but also as an Indian person who was born and raised on Indian reservations—is that our water rights vest as of the creation of the reservations or since time immemorial in the case of the aboriginal water right.

So our water right is a property right under U.S. law dating way back. The problem is that water right has not been quantified. As a consequence of that failure, a lot of non-Indians, many of whom, not all, but many of whom are innocent, came along and started diverting waters and streams that they had no idea belonged to Indian tribes.

That is a very severe problem. We'll hear about it in Indian water settlements. It's a very complicated thing today to do an Indian water settlement because you can't find the water. If your assumption in the settlement is that the existing non-Indian user should be protected—and there are lots of ways to try to create water, including conservation and otherwise—but the simple fact of the matter today is that providing the full amount of the tribal entitlement is very difficult to accomplish. There is a horrible inequity and unfairness in this fact, complicated further by a world view about water that's very different throughout the West, which is very hard to describe.

I don't want to over-generalize or over-romanticize the points of view here. But there still is, in my view, an attitude throughout the West among non-Indians that water is something to be possessed, to wring the most value out of—every single cent and dollar out of it—and make the West a better economy.

In contrast, the tribal people, by and large—while they will use water for their needs—still view water as a very sacred resource. Tribal people consider water to be a living being in a way; one that should be protected and valued for all time. "For all time" is very important, because in these general stream adjudications, what we are doing is quantifying an Indian water right for all time. That's a scary idea—forever—for these Indian tribes and their present and future water rights.

You can imagine from the non-Indian point of view, trying to think in those terms. Every time we deal with non-Indians, they are accustomed to 30-year planning horizons or no planning horizons at all. The idea that a tribe might need to claim and quantify a huge water right for all time for the present and future needs of the tribe is a very scary thing, and it's not well-regarded

when you sit down across the table from non-Indians. They often tell us, "Well, let's get your needs taken care of for 30 years or 50 years." Adjudicating rights for all time is not an easy task for either the tribes or the non-Indians to pursue. So with that backdrop, the United States has a trust responsibility to preserve and protect Indian water. Indian water rights are very threatening to the existing economy and expectations of non-Indians.

Next, I would like to discuss, against this backdrop, whether or not the state general stream adjudications are adequate forums to resolve Indian water right quantifications. I want to cover this area in two parts. First, I will overview the law of general stream adjudications. Then I will make a few comments and raise a few questions for the Commission's benefit regarding whether or not general stream adjudications are adequate forums for resolving Indian water rights, and if not, what are the possible alternatives to this forum.

Indian reserve water rights, as I said earlier, vest as a property right at the time the reservations were created. Where a tribe has been using water since time immemorial, there is a federal doctrine that tribes have an aboriginal water right—that is, a water right with a "time immemorial" priority date. But when the water rights vest at the creation of the reservation, the priority date in western water law is the date of the creation of the reservation. As David pointed out, throughout the West, most of the water law is based on the prior appropriation doctrine.

California has riparian-type rights and they talk about complications. You try to put Federal reserve rights that are Prior Appropriation rights in a state water right scheme with priority and riparian rights, and it becomes very complicated. But Indian rights, again, with priority dates as of the creation of the reservation and vesting as of the creation of the reservation, are unquantified.

Now, there are a lot of Indian tribes that are very nervous about quantifying their water rights for the reasons that I previously explained. How do you quantify a water right for all time? What methodologies are available to accomplish this result? Are they firm, are they fair, are they clear? Does everybody understand them? Is there a dispute about it? The answer to all of these questions is "no." There are a lot of methodologies available for quantifying water rights, and there is a lot of dispute over how to apply these methodologies, especially with regard to Indian water rights for agricultural purposes. With agricultural rights, the practicably irrigable acreage standard has given rise to a lot of dispute over how water is to be quantified.

Nonetheless, that is the task of the United States Government when it has a claim that somebody is taking Indian water. For how can we know that somebody is taking Indian water if the Indian water right is not quantified?

Some tribes say, "It's our water. It flows through the reservation. It always did, it always will. The entire river source is our water right. We do not need to quantify our claim to that water."

How then do you stop the non-Indians who are diverting the water upstream if you do not have a water right that has a size, a number, a quantity to it? Is it true that the tribe owns all the water in the stream or not? We have to have a court declare, or some legislature mandate, that result. Otherwise, the tribe has a claim to all the water in the river, but no ability to tell other people not to take it because there has not been an adjudicated claim to the river—or at least to some amount of water from the river.

There have not been a whole lot of adjudications that have gone forward. In fact, to date, there is only one general stream adjudication in this country that has gone to the United States Supreme Court and that, of course, is the Wyoming general stream adjudication in Big Horn. All other general stream adjudications, and there are many of them out there, have been languishing for years and years.

What is a general stream adjudication, and how does an Indian right get involved in a general stream adjudication? A general stream adjudication can be accomplished in either federal or state court. Everybody involved in the river or having a claim to the river's water is brought into the court. There is nothing magical about a general stream adjudication. It is simply a court declaration of all the rights to the water in the river, based either on state law or—in the case of Indian reserve rights—federal law. A number of state court general stream adjudications occurred in late 1940s and the early 1950s. The states were starting to try to determine who had what water rights and adjudicate them. To accomplish this task, the states tried to bring the United States as a party to the adjudications, since the United States owned lots of land throughout the West that had federal reserve water rights as well as owning some non-reserve state water rights.

Specifically, the United States owns three types of water rights: state water rights, federal reserve water rights, and finally, as trustee for the tribes, federal Indian reserve water rights. Prior to the McCarran Amendment¹³ in 1955, the United States could not be brought into these general stream adjudications, because it could not be sued without first waiving its sovereign immunity.

So, in the state general stream adjudications in the 1940s and 1950s, all water rights were being determined except the most senior rights—those of the United States and, in the case of the tribes, the Indian reserved rights.

¹³ 43 U.S.C. § 666 (1994).

Congress remedied this situation by enacting the McCarran Amendment, which waives the United States' sovereign immunity from suit for purposes of adjudicating all rights to a river or other water source. As long as the general adjudication proceeding is undertaken in a court, the sovereign immunity waiver applies, and the United States can be joined.

When the United States is joined, it is clear that the courts have jurisdiction under the McCarran Amendment to adjudicate, not only the federal reserved and state water rights, but the Indian reserved water rights as well. That is very clear in Supreme Court jurisprudence.

Assuming that the United States is brought into a general stream adjudication, what is some of the case law regarding general stream adjudications? First, we know that the federal courts have jurisdiction to adjudicate the reserve rights, but the federal courts will abstain in adjudication of reserved rights in deference to state proceedings, with some exceptions. Second, there is a theory that the state courts are set up pursuant to a comprehensive state statutory scheme to accomplish their general stream adjudications. As such, the federal courts generally let the state courts adjudicate everybody's rights together rather than try to do a piecemeal federal adjudication of water rights.

However, federal court deference to the state general stream adjudication will not occur where the federal court proceeding (to declare, for instance, the existence and scope of an Indian reserved water right) is well on its way to completion before a general stream adjudication in state court is commenced. The classic case on this point is *United States v. Adair*,¹⁴ in which the 9th Circuit declared and described the Kalmath Tribe's federal reserve water rights, but the actual quantification of the tribal water rights based on the Federal court declaration was accomplished in a state general stream adjudication.

Note that the determination of reserved waters is governed by federal and not state law. Whether you are in federal or state court, federal law determines the scope, size and use of the federal reserved water rights.

Now, let's turn to state general stream adjudications and to an issue that is unresolved in state general stream adjudications: whether or not, and to what extent, state administrative agencies can play a role in the adjudication of Indian reserved water rights. There is one case that has addressed this issue. In 1994, the 9th Circuit held, in *United States v. Oregon*,¹⁵ that the United States was required to participate in an adjudication of water rights

¹⁴ 723 F.2d 1394 (1984).

¹⁵ 44 F.3d 758 (1994).

by a state administrative agency as long as the state agency's administrative action was part of a single statutory scheme that essentially paved the way for an adjudication by the court.

In Big Horn, Wyoming, one of the things that we resisted for years was having the state agencies play a role at all in determining, declaring, describing the reserved water rights, because, like it or not, the reality is state and tribal governments have a long history of a hostile relationship. Non-Indians on Indian reservations may claim that tribal courts are forums that are unfriendly to them, and that they do not have fair participation in tribal government. Tribes feel much the same about state courts. Tribes are often the minority by far, and they do not have any political influence over the selection of state court judges, by vote or otherwise.

There's a long history of fighting between states and tribes over sovereignty issues; most recently in Congress over the Safe Drinking Water Act and the Clean Water Act when the tribes sought to be treated as states under the Acts. The states fought against giving tribes the ability to regulate the environment on their reservations. So this is not an old fight. It's very much a modern fight and a battle for power. So tribes are nervous about going into state courts because those judges are elected fairly periodically, and we feel as though we are going to get home-towned in state courts. There is some evidence that we do get home-towned in the state courts and that is most unfortunate.

In *United States v. Oregon*, the court said, "Well, the state agencies can play a role." In Wyoming, we said, "The state agencies should play no role because they are biased. They are not going to give us a fair shake." Because if they do give us a fair shake, that means all of the state permittees have to cut down their uses, and they might not get any water at all. Our fear is that no state agency or political judge is going to give Indians a very large water right in that context.

Is it a well-founded fear? It is hard to say. We have some evidence that perhaps it is, but time will tell. In *United States v. Oregon*, the single statutory scheme that paved the way for an adjudication by the court, was one in which there was no ability of the state administrative agency to make binding findings on either law or fact.

Well, how is that working out today then? Let us take Nevada for example. There is a general stream adjudication going on at the Las Vegas Valley Basin, and United States Justice Department has said, "We are not going to participate. We think that that is an agency action, not an adjudication, because the agency in Nevada has a very strong role in going out and reporting on the claims that are made by all the parties, including the claims based on Indian reserved water rights." Essentially, the state engineer

makes a preliminary order of who has what rights. This is administrative agency action, not court action. Next, objections to the preliminary determination made by the state engineer are collected. Then the state engineer issues a final determination, and that determination goes to state court, essentially becoming a complaint.

So we have all this activity going on in the state agency in Nevada. Is this proceeding encompassed by the waiver of sovereign immunity in the McCarran Amendment? I think there is some serious question about that.

What are we doing in Big Horn? Early on, we had the state administrative agency taken out completely. The state agency does not report at all on the reserved water rights. Instead staff of the court would do that.

Now, we're in the *Walton* case. That means we're adjudicating the reserved rights claims of non-Indians who bought former allotments and claim now that they had the right to use a portion of the treaty reserved water right for irrigation purposes.

In Big Horn, we have a little bit different involvement of the state agency—that I think it is a little more palatable from a policy standpoint or the tribal point of view—and that is this: claims for *Walton* rights are filed with the state engineer. These are procedures that the parties worked out in Big Horn by consensus; basically, special procedures under the McCarran Amendment for *Walton* rights.

The claims are filed with the state engineer, who then goes out and finds out all the documents available to substantiate the claims or not, puts all of them in a report to the court that is then filed with the special master. At this point, all the parties are notified that the report by the state engineer was filed. However, the report has no weight as evidence whatsoever. Instead it goes to the special master who then takes objections to the claims described by the report. So the state's position as an administrative agency is irrelevant to the adjudication.

I think what Congress intended is that the state agencies not play a role in the adjudications because the McCarran Amendment is a waiver of sovereign immunity from *suit*. We got to have a lawsuit here, and a state administrative proceeding that makes binding determinations is not a lawsuit. Thus it is not consistent with the McCarran Amendment. However, this is an issue that's going to arise increasingly in general stream adjudications. That is, what is the proper role for the state, and should the United States Government be giving advice or guidance regarding the proper role of the state?

Another issue that is commonly raised in the McCarran Amendment or general stream adjudication cases is whether the lawsuit is sufficiently comprehensive to adjudicate *all* the relative rights to the river system or other source? Unfortunately, the courts are going all over the place with this issue. Hydrology has progressed faster than federal policy on water, and we know more and more about the interrelationship of groundwater and surface water. It seems as though the more we learn about hydrology, the more complicated it becomes. We know that, with few exceptions, groundwater and surface water are interrelated. It is just a question of time before the impacts of one use on the other will be felt.

So what did Congress have in mind, then, when it said that immunity from suit is waived only if there is a comprehensive general stream adjudication determining all the rights in the river system or the source? What is a river system? Does it have to include the groundwater as well as surface water in order for the United States' sovereign immunity waiver to be valid? Some courts say "yes" and others say "no." The 9th Circuit, in *United States v. Oregon*, held that our understanding of the hydrologic relationship between groundwater and surface water still is so new that the Court would not require, under the McCarran Amendment, that the surface water and the interrelated groundwater be adjudicated as the same river source in order for sovereign immunity to be waived.

Now, I think that's a policy question that Congress needs to think about. Was that what Congress had in mind, or are we going to piecemeal adjudication in these state courts? First, we are going to do the surface water and then we're going to do the groundwater, maybe, someday? What happens when the groundwater impedes the surface water or the surface water starts affecting the groundwater? What are we going to do about that? We have done something piecemeal. Is that what Congress had in mind in the McCarran Amendment? I think not. Of course, in New Mexico we are doing it right. We have, in the *Aamodt*¹⁶ case, a general stream adjudication going on in which both the surface waters and the interrelated groundwater are being adjudicated. I think that this is what Congress had in mind under the McCarran Amendment.

Now, interestingly, it is not always clear whether all the tributaries to the river system have to be included in order for Congress' waiver of immunity to be valid under the McCarran Amendment. Courts have gone both ways on the issue. In Colorado, they did not adjudicate tributaries as part of the general stream adjudication, whereas in Idaho they are adjudicating all the tributaries as well as the main stem of the river because in their view that's the river system.

¹⁶ 537 F.2d 1102 (1976), *cert. denied*, 429 U.S. 1121 (1977).

My next point regarding general stream adjudications in state courts is this: the United States Supreme Court in the 1993 case *United States v. Idaho*¹⁷ held that the United States is not required to pay state filing fees in general stream adjudications, because the McCarran Amendment expressly provides that "no judgment for costs should be entered against the United States." Although we're not sure what "costs" and fees are exactly, the Court decided that it was going to be very careful in determining when the United States waived its sovereign immunity for purposes of paying money under general stream adjudications. So I think the courts are going to carefully guard the United States' waiver, and not hold the United States liable to pay for portions of these state court general stream adjudications once they are started.

Interestingly, along those lines, although the state procedural laws apply in state general stream adjudications, remember that the state courts are quantifying the federal rights under federal law. There's a procedure for making all this happen, and that is under state law. This is okay under the McCarran Amendment. But any procedure in which the states purport to be part of a McCarran Amendment, or to be getting ready for a McCarran Amendment case, is going to receive strict scrutiny by the Supreme Court.

For example, in *United States v. Oregon*, there was a preliminary registration statement required to be filed, to give the state agencies some idea of the scope of what was going to happen if it started the general stream adjudication. So the agencies were getting ready for a general stream adjudication but not really doing one yet. And the courts said, "That's not good. The United States' sovereign immunity waiver does not apply there." It has to be an adjudication or an integral part of an adjudication. A state can't order the United States to file registration statements unless there's a general stream adjudication started, and filing is part of the adjudicatory process.

Let me close by making a few comments about the history of Indian tribes in these general stream adjudications. I want to start by pointing out one big advantage and then note the many disadvantages. The big advantage, it seems to me, is that general stream adjudications—particularly where there's a comprehensive statutory scheme to make the general stream adjudication go forward—are a known quantity. It's something with which we can work.

That is a big question in water rights, because water rights are a unique species of property not really owned by anybody. It is a right to *use* water. Governments permit and regulate the right to use water. There may be an

¹⁷ 508 U.S. 1 (1993).

individual property interest in that right to use—there is debate about that—but I think there is a use right in individuals. So how do you bind people after you adjudicate an Indian reserve right? How do you get everybody bound to that result short of a general stream adjudication in which everybody with an interest or claim in the same water source is brought in and has their day in court? The big advantage in these general stream adjudications, if they are done right (and I'll tell you what I think is doing them right is), is that the senior water rights can be determined for all time with finality. Nobody can claim later on, "I wasn't there—I didn't participate." Because there is a procedure and a comprehensive statutory scheme for bringing everybody in and saying, "You get your day in court and you do not get another day in court. It's done. Indian reserve rights are quantified, no question about it."

Where general stream adjudication have done what is logical, which is to start with the oldest rights first and then move forward, in order to see whether there's any water left after all the seniors are taken care of, the tribes have had good experiences. In particular, I would like to cite the *Aamodt* general stream adjudication in New Mexico.

Now, that has been going on a very long time. It has taken the court, in my view, excessively long to adjudicate the rights. I think one of the criticisms of general stream adjudications is that the courts need to hasten the process. The courts, I think, really want the parties to settle, and we're going to have a whole half day on the problems of settlement now and why settlements are not happening.

So the United States is in the odd position today of deciding, "Shall we make our policy on settlement stronger and try to get settlements done, because the United States is trustee here and failure to act can result in monetary damages by Indian tribes against the United States Government for failure to protect the Indian water right." The United States right now, it seems to me, ought to be thinking, "Well, should we get the courts to expedite some rulings here or should we negotiate?"

Let me tell you about *Aamodt*. This summer the Indian Pueblos sat down in *Aamodt* and said, "You know, this case has been going on for twenty years and non-Indians still get all the water. We have been adjudicated at least preliminarily, although not in a final order, as the senior water right holder. Yet, every year we get what is left over when the non-Indians are done. Now, what is fair about that? It has been twenty years since we began."

The tribes have been irrigating since time immemorial and their fields sit dry. What is fair about that? So the Pueblos came to us and said, "Isn't there something we can do about this? Can we ask the court to enforce what it has ordered?" The orders are not final. In law that means we have not appealed

them all the way to the U.S. Supreme Court, but we sat back and said, "Well, there's something very unfair about that. Why don't we go ask the court, through a motion for injunctive relief, to enjoin the juniors' use upstream? Last summer was a dry year, we all know." So we said, "Well, let's give it a shot." I mean, it's not, in our view, as good as having a final order of adjudication, but let's just go ask the court to enforce the senior right.

So we filed a motion with the Federal District Court this past summer asking the Court to enjoin the junior water right users upstream of the Pueblo of Tesuque in New Mexico. Fortunately the juniors came forward and said, "We'll work with you. You're senior, we admit it. There is no sense in having a long court proceeding and all kinds of affidavits and experts dueling away this summer." Meanwhile, everybody's fields were going dry. The juniors made a deal with the Pueblo of Tesuque in which the senior water rights were provided for first. Then when we got taken care of, we rotated the water back to the juniors. Now, admittedly the Pueblo of Tesuque, in an exercise of goodwill, did not irrigate all the land to which it was entitled last summer, but it irrigated a substantial amount of land that it would not have been able to irrigate if the juniors hadn't come forward as part of this agreement and let the water run down.

My view was that in *Aamodt*, the court was poised and, in fact, set an expedited hearing schedule for the purpose of hearing this, and now in *Aamodt*, the judge has ordered us sua sponte (meaning "on his own") to come up with an administration plan for the rest of the case. I think the judge there is getting real hot to start enforcing the senior water rights.

Well, that is how it should be. That is a good result, but it is rare. On the Gila River in Arizona, Indian reserved water rights are not even close to getting adjudicated for the first time, so that twenty, thirty years later, the Indians who have the senior rights in Arizona are still not being protected. There is something wrong with the general stream adjudications like that.

Let me tick through a couple other points here about general stream adjudication. I did tell you about the role of the state administrative agency and the state itself.

In Wyoming, we are in a running battle with the state that is quite frustrating and upsetting to me. The state agency plays the role that I described in the *Walton* case, where it just reports on what evidence is available and then goes to the court. There is a big procedure for the parties to object to the claims that are made and described in the report. But the State of Wyoming repeatedly has not followed the procedure—I think, in part, because the State of Wyoming is unclear about what its role in the adjudicatory process is.

The state said, "Well, we're the reporters. Why should we object to our own report?" I say, "No, the state is a party to this case. Your administrative staff in the state engineer's office is like an arm of the court. They are no longer your staff for this purpose. You have to object just like anybody else if you want to participate in the *Walton* trials."

We had a big snafu, in which the state failed to object and follow the procedures to the claims and then wanted to join in the *Walton* trial and participate. We said, "No way, you didn't object. Everybody has to object." So we went through a bit row over that, and spent four or five months and countless thousands of dollars fighting over the issue.

The state has to stay out. In my view, the United States should make clear that the waiver of immunity under the McCarran Amendment was into an adjudication in which the state may use its staff. But the administrative staff should be very clearly understood as arms or staff of the court and not staff of the state. Even the state is confused about the role of its staff. This is no good. We are wasting time on issues like this over and over again. I talked about phasing. General stream adjudications can be advantageous because they bind all the parties. You are getting the Indian reserve right quantified, and this is good as long as the phasing of the Indian rights is done in a sensible way. That is, the senior rights ought to be done first and not much later in the general stream adjudication.

The state procedural schemes under the McCarran Amendment are all over the place, so depending on what state you are in, you have a slightly different—or maybe significantly different—scheme for implementing the McCarran Amendment general stream adjudication. Some state procedures are very cumbersome. It seems to me that maybe some guidance to the state courts to come up with procedural schemes that are more uniform, like the typical rules of discovery, would be appropriate. Let's not make up these unique procedures for general stream adjudications because they confuse people. Why do we need something different from the general procedural rules for any trial? Creating a hybrid process is not working. It's causing delay. It's causing parties to spend money on things that are just mind-bogglingly frustrating, like procedure.

Finally, let me just note that whether you are dealing with Federal or state court, the simple fact of the matter is that there still is a lot of Indian reserved water law, as you can see in my outline that I submitted for materials. I'm not going to go over it now, but there are still a lot of unknowns on the contours of the reserved rights doctrine. This uncertainty makes the courts really reluctant, but if you think that is hard, try the negotiations. Many parties are unwilling to settle without knowing what the

basic Indian reserved water right is. This is really unfortunate. Is there an alternative to general stream adjudications? I want to leave you with one thought.

It seems to me that what the United States is trying to do is adjudicate the reserved water right because it has a trust responsibility to do so. It seems to me there ought to be more considered. I know there's a lot of discussion going on about bringing federal court declaratory actions to adjudicate only the reserved water right, suing all the parties who might have an interest in the same water source, just like you would in a general stream adjudication, but you're not stuck with thirty years of adjudicating everybody's rights. This would be a cleaner action. It may yield faster results for adjudicating reserved water rights. So I leave you with that question: what is wrong with federal court declaratory actions regarding Indian reserved water rights?

Environmental Management and the Effects of Water Use

Chelsea Congdon¹⁸

I was asked to talk about environmental management and its effects on water use; and specifically the effects of environmental water issues on tribal water management. I would like to communicate that all of us—conservationists, tribes, policy makers—need to think creatively, in our work and our recommendations, about ways to respond to the revolution that David Getches described. I'm not a lawyer so I can't give you the background on different cases or settlements, but there are some that I will use, or refer to, to illustrate some of my points. But first, I would like to begin with an observation that echoes David's comments: that we are now looking at western water policy driven by an entirely different set of concerns and priorities than first existed when the institutions and agreements for managing water resources were created.

In those days, simply put, the development of western water by the Federal Government was seen as essential to enticing settlers, non-Indians, to the West. Today, the focus is on managing water resources to meet increasing and competitive demands for water in an environment where water is scarce, and where all water users and uses are, in fact, interdependent.

Environmental water needs are relative newcomers to the water policy arena, and unfortunately, they are often seen as a competitors to the reliability and certainty of consumptive water uses. For some tribal users, who have not yet had the chance to fully develop or—in some cases—quantify their water rights, environmental water needs are seen as an obstacle to the achievement of tribal equity; both under tribes' treaty rights and under their goals of self-determination that are associated with resource-based development.

Seeing these environmental issues and other issues as opposed is not, I think, constructive. If possible, in most cases we should create situations where we don't have to choose between the Endangered Species Act and treaty rights. In the issues that surround the development and settlement of tribal water rights and the protection and restoration of aquatic ecosystems, we can find ways to not be at odds. Environmental water and tribal water are now among the most defining and significant components of contemporary water policy.

Given the economic and political context that we face today, it's critical that tribes, conservationists, and the people working on policies to resolve these

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issues find forward-looking ways to improve institutions and implement administrative arrangements so that diverse needs can be met. It's going to take innovative thinking. It's going to take tribes, conservationists and others being pro-active, and it's going to depend on all of us having the courage and the goodwill to try to work together.

Some would say that environmental demands are the biggest pressure on water in the West right now. In fact, the biggest pressure on water in the West right now are urban demands. In the arid Southwest, in the wet Pacific Northwest, throughout the Rocky Mountain Region, urban growth now is occurring faster than it has at any point in time—anywhere.

Partly as a result of this growth, there are now administrative and management changes that are being proposed in river basins, including the trend that David mentioned toward watershed management. Among the greatest sources of uncertainty, as we try to improve the management of water to meet growing demands, are the settlement and quantification of tribal water rights and the achievement of certain levels of environmental protection and restoration.

As David's comments indicated, I think that more than before, tribal demands and environmental demands are going to have to be met through improved water management, conservation, efficiency, reservoir re-operation and the re-allocation of water through markets and other mechanisms. So from a certain perspective you could say that unmet environmental needs and tribal demands are in the same boat; but at the same time, I recognize fully the difference in the nature of these demands, and that the tribal issues and conservation issues are different at their core.

I think back to a meeting that took place in December of 1995 on the Flathead Reservation. It was a meeting of conservation groups and tribes that was sponsored by the Native American Fish and Wildlife Service and the World Wildlife Fund. The purpose of the meeting was to explore the potential for cooperation between conservationists and tribes. I think anybody who was there would agree that that meeting was candid, and it was honest, and it was difficult.

It was difficult because we come from different cultures, and the issues that conservation groups work on are for tribes much more fundamental. They are issues that are part of the tribal identity and self-determination. That difference seems to make it difficult for us to find ways to work together, but I think we can and I think we must.

A more practical and political reason for looking for ways to work together is that conservationists and tribes, as parties with interests in water, have had relatively little political power or clout in the western policy arena, for many of the reasons that Sue Williams described.

It is true that tribes enjoy a unique government-to-government relationship with the Federal Government, and that the U.S. Government has important treaty and fiduciary obligations to the tribes. Even as we meet this year, I expect that this relationship can be used, as it should be used, by the tribes to leverage more action by the Federal Government to resolve tribal water issues.

However, I also strongly believe that success in securing and developing the water rights to which the tribes are entitled will necessarily involve finding ways to achieve those goals in conjunction with the resolution of other water management issues. This is particularly true given our new era of budget politics in western water.

Western water policy is dominated by stories of conflict, and it's based on mountains of laws, policies, institutions and technical fixes that are designed to address these conflicts. Like growing urban water demands, I would say that environmental water demands are here to stay, and as we develop a tribal agenda for shaping water policy, we will have to take into account environmental water needs.

I personally tend to agree that it's not fair that tribes—after waiting and working hard to be in a position to develop water rights—now face environmental constraints to developing their rights, but this is where we are. It's part of the landscape, and I think we have to figure out the best way to deal with it.

The fact that environmental issues can and do figure into tribal water issues can be seen in some of the recent tribal water settlements. Before the 1990s, there were very few, if any, settlements that had explicit provisions and conditions for addressing environmental matters.

Since 1990, there have been several examples of settlements where environmental water issues were an explicit component of the settlement for tribal water: the Fallon Paiute-Shoshone and Truckee-Carson-Pyramid Lake settlement in 1990, the Jicarilla-Apache settlement, the Wind River litigation—which is full of issues about instream flows, the ongoing Animas-La Plata Project, and the Colorado Ute Indian water rights settlement.

At least one of these serves as an example of an instance where environmental needs actually helped to advance the water right settlement. In the Fallon Paiute-Shoshone and Truckee-Carson-Pyramid Lake water

rights settlement, the endangered cui-ui in Pyramid Lake and the needs of the Lahontan Valley wetlands for water threatened to impact urban water users in Reno/Sparks as well as irrigators. This situation served, in large part, to bring the urban interests into discussions with the tribes. I think it's far to say that in that case, the tribes' position was strengthened by the Endangered Species Act, by demands for greater water use efficiency, and by an alliance that was created between conservationists, tribes and other people in the region.

So what is ahead? We have entered a new era of western water policy. It is about tribal water rights. It is about environmental water needs, and unfortunately it's about the budget. The fight over the Animas-La Plata project in Colorado is one painful example of the kinds of issues facing tribes and conservationists in budget-tight times.

In Colorado, the State Governor and Secretary Babbitt have recently convened all of the parties to the Animas-La Plata conflict to see if they can reach a consensus on alternatives to the project that would still provide water to the tribes and to other parties in the conflict in a less environmentally damaging way.

The opponents to that project interestingly include conservationists, taxpayer groups and citizen groups. Taxpayer groups are new in this western water battle. I think it's correct to say that the opponents to the project are unified in their commitment to finding a way to satisfy tribal water rights, but they feel very little obligation to spend taxpayer dollars to deliver water to non-Indian irrigators.

The proponents to the project have options to consider—including litigation. But there is also an option for tribes, conservationists and taxpayer groups to try to work together to find ways to satisfy the water and equity demands of the tribes. It doesn't mean that the tribes and the conservationists will agree on everything, but cooperation between them might strengthen their respective positions.

In other words, meeting water needs for endangered species and ecosystems should not preclude the satisfaction of tribal demands, and hopefully vice versa. However, the timing of both of these demands within the evolution of western water policy indicates that they will probably have to be solved together—at least in many cases—and maybe they can be.

There are some interesting precedents evolving. The jury is still out as to whether they will work. But in the Colorado River Basin, for example, the Recovery Action Program for endangered fish in the upper basin is predicated on finding ways to recover the species and to accommodate future water development.

In the lower Colorado River, there is a multi-species conservation program involving states, tribes, and the Federal Government. The program is designed to try to protect and restore endangered species consistent with the Endangered Species Act, and to accommodate water use and development by the lower basin states and tribes.

Watershed management plans are another opportunity for joining tribal, environmental and other concerns. The Chelan Agreement in the State of Washington involved tribes, conservationists and water users working to address conflicts between endangered salmon, a growing population's demands for water, and water development goals.

In the Deschutes basin, the Environmental Defense Fund and the Warm Spring Tribe have worked together to identify the threats to water quality and instream flows and to try to develop solutions to those problems. Again, the Deschutes Basin Resource Conservancy includes a whole cast of characters, including conservationists and tribes.

So in sum, I think that conservationists and tribes face similar, albeit not identical, challenges when it comes to achieving water management goals. We are operating in a context where most of the river basins in the West are fully appropriated, where urban populations are mushrooming across the region, and where there are not deep-federal pockets to pick up the costs of making good on old promises.

Solving these problems is going to take a combination of water and money, and there are a lot of ideas being kicked around. David mentioned water marketing and other avenues that people are exploring.

The Ten Tribes Partnership in the Colorado River Basin was formed in 1992 to try to achieve greater equity for the tribes with water rights in the basin through marketing. The Environmental Defense Fund, among others, believes that we can find ways to arrange leases of water that will protect tribal rights, generate revenue and provide instream benefits as well.

In addition to water marketing, it's probably worthwhile for people to explore options for leasing a certain portion of water for instream flows or other environmental benefits in exchange for explicit guarantees to develop rights to other water in the short term.

Tribes, conservationists and others should explore the possibility of using a portion of revenue streams from hydropower projects, since after all, the electricity derives largely from tribal water. These funds might be used to finance economic and water development by the tribes and also to finance environmental restoration.

This seems like a long way around the question of environmental management and its effects on water use, and I think that's because nobody can predict with any confidence what impacts environmental water needs will have on water development, at least not quantitatively, but we can be certain that the environmental needs are going to be part of the mix.

I believe the single biggest change in western water policy—and challenge to tribal water development—is budget politics. The United States Congress is looking for ways to cut funding for basic human services, school lunches, and welfare programs. It's unrealistic, I think, to expect that the government will find large amounts of money to build the Animas-La Plata project, or other expensive water projects, for tribes or for anybody else.

But it will take money to turn tribal paper water rights into wet water, and it will take money and water to restore protected environmental resources. If we can figure out ways and situations where we can work together to raise the money to acquire the water, to develop revenue generation, to enhance water development and to facilitate water development, then I think we are on the right track.

For the benefit of all of us, I guess, I would share the embarrassing experience of conservationists, who in working to pursue solutions to environmental water problems or other environmental problems, are basically lousy at working together. We are only beginning to learn how to work with each other to advance issues that we have in common.

What we find is that we can be successful, as coalitions, when we have specific tasks and when we are dealing with certain defined issues. So we don't have to agree on everything. We just have to agree on something. If conservationists can agree on certain thresholds and criteria for success and minimum goals, it turns out that we can work pretty effectively together, much to our own surprise.

While conservationists and tribes are very different and have very different cultures, there are certain issues we have in common. Where we can agree on a set of goals and criteria, where we can contribute to a collaborative effort based on our respective strengths and our technical abilities, and where we can create an alliance that can succeed in those instances, I believe we can and should work in that direction.

***Comments of the Chairman of the Northwest Indian
Fisheries Commission***

Billy Frank, Jr.¹⁹

Water, as you heard, is so important to all of us. Right after World War II, there was a guy who sang a song about a another guy name Ira Hayes that lived right over here. He sang about the Pima Indians that live right over here. He sang about the water, the river, and the Indian people, and where are they at today?

You know, in 1945 Ira Hayes went to war; in 1945, I went to jail for treaty rights, fishing on the Nisqually River, and I also went to war like a whole lot of us.

Then where are we today? Where are them people today? They dried that river up over here. There is no river. They took all of their way of life away from them. They took their food, and they gave them surplus food. When they gave us surplus food, they gave us sugar diabetes. When they took our water away, they give us sugar diabetes. When they took our culture away and our way of doing what we do, they gave us sugar diabetes. Today, we have it.

I see a lot of my friends walking around without any legs on. That's very sad, and that's what we are talking about here today. We are talking about a culture and a race of people that nobody in this country gives a damn about. Nobody. There is no leadership out there today that gives a damn about Indian people.

There is no leadership within these states that gives a damn about Indian people. There are no legislators and no Congress that gives a damn about Indian people, and it seems like we are going on a head-on collision with the United States Government, and with our neighbors that are in our own backyards.

This river right over here that they dried up—those Indian people can't move to New York, or to the Northwest, or to the Pacific Ocean. This is their land. None of us move. None of us Indian tribes move anywhere. This is where we are and this is where we live, and we'll be in these types of forums addressing water from now on.

¹⁹ Chairman, Northwest Indian Fisheries Commission, Olympia, Washington.

The salmon in the Northwest are leaving us. In that big Pacific Ocean out there, the mighty Columbia River, the mighty Skagit River, the mighty Nisqually River, the 80-mile river that I live on, the salmon are depleted, and they are leaving us.

It's water—the salmon need clean water. They need water to survive, to go up to the headwaters and migrate out, to go out into the ocean for as long as seven years and return in the life cycle. They need clean water, and what is wrong with clean water in our lifetime?

Senator Slade Gorton, from the state of Washington, is always mucking around with the Clean Water Act when it comes up for reauthorization. He wants us to get in a fight with the states over the Clean Water Act. If we have agreements on the checkerboard of our reservation, he wants us to fight with our neighbors, keep the pot stirred, keep us in court.

We need medicine like everybody else. We need the hospitals like everybody else. We need the funding like everybody else. We need to be at the table like everybody else.

We've had commissions study us over and over and over, and we are studied out. We still show up. We are still out there. We are still out in every one of these watersheds throughout the land. Our western governors, they meet every year to talk about us. They don't know us, but they talk about us. The attorney generals of the Western United States, they talk about us. They don't know us. They have never been on a reservation, but they talk about out. They talk about our rights and our treaties. How can we out-maneuver these Indian people? That's still going on today.

We have all kinds of problems in the Northwest right today on the reservations, adjacent to the reservations and in our watersheds. We've had 500-year floods. 500-year flood. Before the 500-year flood, we talked about a 100-year flood. A 100-year flood, we could live with that pretty good, but the 500-year flood—it took all of our houses down the river. That's fine. We lived there. We'll build more houses. We will put up with that river. But there are no trees anymore to hold that water back up in the watershed. They've all been cut down.

The universities have taught people to look at a tree that has board-feet in it, that is money—not to look at a tree that has water and everything that's below: the immune system, the mosses and everything.

We do have a problem right now facing us with the United States Congress, with the leadership in the United States, with the leadership in the states, and the legislation in the states. It seems like everything is coming onto the Indian. The people that live on our reservation say they don't have to pay

rent any more on a lease agreement within our boundaries. So we go to the United States and the United States says, "I guess they don't have to." You know, who do we go to?

What options are left for us? Do we pick the gun up and start shooting our neighbors? No, I don't think so. You know, what option do we have to try to live in a society that don't give a damn about us or our children or our health or our environment? How do we walk in this country with you—with this society that doesn't have our names in its history books?

This story that was told today about water is very, very true, and we have water agreements. We have a Secretary that's coming tomorrow that has done very little about Indian tribes throughout our nation. I think we have to deliver a message to him that we want to sit down with him in a forum and talk about our problems.

As David said earlier, we in the Northwest, we have to deal in fisheries management every seasonal time of the year. It's happening today. There's a little bit of fishery remaining, and we have to attend to it. We have to manage it, along with the State of Washington, National Fisheries and Fish and Wildlife.

We have to address the endangered species right now, today. So we did. We had to go to the Secretary and try to get a secretarial order or go to Congress and change the Act. The tribes feel that the Endangered Species Act does not apply to them, to us. The United States says it does. That's fine. Let's not fight about it. We don't want to get in court and test out the United States Supreme Court on our treaty rights again, and then have them dictate to us what we are going to do.

So we stayed out of that arena. We had 150 tribes up in Seattle thirteen months ago to address the Endangered Species Act, and out of that came, "yes, you will sit down, the tribes will sit down with the Secretary and try to draft an order." Thirteen months later, the order is just about ready to be signed, and hopefully they are having a meeting today with Justice to try to pull all this together because we are done now.

The tribes have presented their case in front of the Secretary and so it should move to become a secretarial order. Hopefully, that will give our landscape a lot of management and a lot of tools for our tribe. Hopefully, they will leave us alone because we are managing for the endangered species and all the species.

We want to work with the United States Government, with the states and with our neighbors, but we want the respect from all of them. Right now, we feel we don't get it.

We see the water still going by, and some of us see the water not going by. We see the waters being dammed for agriculture. On the desert up in Eastern Washington, they are growing grapes. They've got water from the great Columbia River and the Snake River. You know, you shouldn't even be growing grapes out there, but with water you can do that, and so now they are a political body. You'll never stop them growing grapes anymore. They take it right out of that river, that giant river.

The state legislature today in the State of Washington has some ten or fifteen water bills out. One reads that the water going by down the Columbia River is being wasted, so we've got to corner that water somehow and use it.

The state legislators don't talk to us. We testify in front of them. They don't give a damn about what we say or what kind of paper we hand them or anything. All they are looking after are the special interests of their people, and we don't have any representation whatsoever on any of the legislatures, the United States Congress, the body of the United States Supreme Court or among any of the judges.

You know, we have to take our case ourselves and that's why we are here today, to take our case forward and find out who we can talk to. Can we talk to this guy tomorrow? You know, he's in charge. Can we talk to the President to address water issues?

We have a team of the most capable people in Indian country that is ready to sit down and find some solutions to our problems. But is the United States Government ready to do that, or the states, or our neighbors, the industry, big business, whoever?

We need the money to do that. We need money from that renter, the United States Government. He's still renting this land, and he'd better be paying up. Senator Gordon, right now, is finding ways to cut our budgets so we don't—we can't—sit down at this table. We have to have that funding coming in so we can sit down and solve some of these problems that we have.

So we ought to think about this *60 Minute* program that was on several months ago. Some of you might have seen it—they were talking about Russia. Russia is dying, that culture over there. They don't have any infrastructure. They don't have doctors. They don't have dentists. They don't have any of that.

I sit there listening to this 60 Minute program, and I thought about us, us Indian people, here. I thought about our old people, our people down in the desert, our people up in the mountains, our people along our watersheds, our

rivers. We are like those Russian people. If the world allows that to happen in this world, we are in bad shape. If the United States allows that to happen, we are in bad shape.

But we will not sit by and watch our water being taken. Something has to happen and we are going to find a way. That's why this meeting has been called, and hopefully the leadership will come up with some direction.

Comments of The Chairman of The White Mountain Apache Tribal Council

Ronnie Lupe²⁰

On my reservation is a river, the East Fort River, that is very big right now. It flows all summer and winter. At this time of the year, with the winter runoff, it's very big, but in the summertime it's beautiful and many non-Indians fish on that stream. Many years ago, I happened to observe an incident there.

There were some non-Indians fishing. They were camped up and down the stream, like they normally do when they come to visit us on our reservation. There were several fishing quite close to one another, and here comes a bunch of Apache kids, three young kids, maybe about eight years old, maybe ten years old.

They had a bunch of cans in their hands. The kid up on the upper river throws these cans in the river and the lower kids, when the rapid comes, these cans would come by and they would throw rocks at them. This extremely annoyed the fishermen, but the kids, they continued to do that.

So one of the fishermen came up to me and said, "Can't you stop these kids from doing that? I'm fishing that they are dirtying the water." I said to the gentleman, "Those kids you're talking about *own* the water. They own the water. They own the river." He said, "I don't care if they own it, but I bought a permit to fish here."

And I said, "You and I have a different view. You are an adult and I am an adult, also. To those kids, those cans that are floating by are monsters. They might be a submarine, they might be a battleship they are trying to sink. They are having a good time with their own environment." And he laughed and said, "Oh, so that is what is going on."

Sometimes we don't know what is going on in the Indian mind, but that was what was happening there. That's the first time I ever said to somebody, some years ago, "Those Apache kids, those youngsters, own the river, own the water."

The Apache way is to bless ourselves with water. It's very sacred to all of the American Indians across the country. We spread water in four different directions. There's a story behind doing that. It connects with all the

²⁰ Chairman, White Mountain Apache Tribe Council, White River, Arizona.

environment: the land itself, the wind, the river and the fire. These are very sacred to all of us—to the Apaches, particularly, since we live up on a high mountain that becomes frozen solid sometimes in the wintertime. In the summertime, it grows trees.

Why do we do that? For lack of better words. But in our mind, as we are thinking, why do we pray in that way? Very little has been said about the groundwater that recharges the streams that we use up on top. It grows just about everything that we can think of, even ourselves.

An old man was talking to me many years ago. He probably was about my age at that time, and he said to me: "You know, when I walk, there are vast trees, sixteen million acres. About half of that is yellow pine" (The mainstay of our economy is the timber operation on our land) He said, "So those trees can talk to you, they can speak to you, if you come up close. They will call you. They will tell you, 'Do that again.' You ask, 'Do what again?' 'Throw it in a different direction, four different directions, and he will appreciate that.' 'Why?'" "Because not too long ago this tree was that big. Look at how big it is now. It's a gift that was given to each and every one of us, to respect, to respect what we use ourselves. Even the stars, they are replenished also."

So we talked very deep, in an area I have rarely traveled. The philosophy that he brought to me at that time still sticks with me, and what David said about conservation, about economy reminds me of so many of those times.

Yes, we are energetic, as Apaches, of course, but other tribes are, too. There are heros in every tribe, well-known chiefs, and we take their words, their thoughts with us today. It still lives with us. It's alive with us.

We wanted to use water. It's nobody's business but ours. In 1957, which was not too long ago, we decided to put a dam on a little stream up on the highest mountain called Holly Lake. Some of you might have been there in recent times. The Salt River water users and other water interests tried to put a stop to that. They did everything in the world to stop us. They hauled us into court, but we continued to work and plan. We hired a construction firm, who was a friend of ours by the way, and we said at that time, "You may get into trouble. They may haul you off into court. They may put you in jail," because the State of Arizona was pretty hot, and we were determined to build that Holly Lake, determined to impound that little stream.

Why? Because of what you see there, survival into the future. The future was very much on our mind, our children, economy. So at the very last moment, I was one of the ones who was building that dam. I was not on the council at that time. My dad was, who no longer lives. The governing body who initiated it all are no longer alive.

At the very last moment, the United States Marshall came, and each and every one of those government people left the reservation. Some of them went to Hawaii, one or two to New York and some to different countries. They had a big package to slap on somebody, and there was not a single government person they could slap it on. They were all gone, and we were there building that dam.

At the main entrance—there were two main entrances, and we blocked all the others to Holly Lake—we had game wardens with rifles. The United States Marshall stopped there, and they almost came to a fight. We had arms, and they had arms, and we were going to defend ourselves. They had no business interfering with what we were doing. They had no right at all to try to stop my tribe from building that dam.

They came very, very close to blows. They thought there were only two rangers standing there at that road—but we Apaches are noted for camouflage, which was used wonderfully in World War II, by the way. And I trained at Camp Two, Marine Corps. How amazing it was that Apache was heard everywhere. This is how Geronimo did it.

Victoria did it this way, camouflaging ourselves. Up in the higher mountain, we had high-powered rifles they couldn't see. If they shot those two rangers or tried to break through them, they would have never made it, but they didn't try. Airplanes would come by flying low, like they were attempting to drop a bomb. Twenty-four hours a day we worked, and we built that dam.

At the very last moment again, we heard that they were going to come in. They notified every one of us what was going to happen. Not a single word was spoken in English. Every word that was said was in Apache. We had some non-Indians working for us, but we'd tell them what we were talking about later on so that they would not even squeal what we were saying, what we were talking about.

So when you walk on my land, Apache language first. If you speak some other language, you're in tough luck. You got to read and write in Apache, if you step on my land today. Just kidding.

But anyway, at night we packed up. It was done and we left. On our tent we put in mud, "Nobody home", and we all exited, clear at the other entrance that we had destroyed. We left there and went around the other way and came back to White River. The next day we saw the Arizona Republic: "Nobody Home" was on the front line.

Everybody was so interested in what we were doing over there like that. How magnificent it was! They were so interested in the survival of the

Apaches, to conserve and build for the future of our people. We were on headlines. I never read what it said, but we were so proud of what we did.

After that, we built another lake and another lake and another lake and another one and another one. We have 21 lakes, manmade lakes, on our reservation. Come, enjoy yourself, bring your children, your kids and fish and dance with us, sing with us. You are welcome on our reservation. And don't forget your money bag: we have a casino on the reservation.

If you just so happen to know how to ski, we have tons and tons of snow yet. It will go all summer. If you have a pair of skis, go out there. In the summertime it's so hot over here, so doggone hot that you can't stand it. So, as a result, looking ahead, looking at those three or four directions there, we are going to build you one of the finest convention centers you ever saw. Come, let's have a meeting over there.

I invite you, Commissioners, come to an Indian reservation. You will have the finest opportunity to ever visit, as a body, an Indian reservation. Perhaps maybe one of us will join you then and sit with you and talk with you about adjudication and Indian water rights. We love to talk about our water. Why? Because we own the water on our reservation. Elsewhere nobody owns it. I wonder why. We own ours—the White Mountain Apache Tribe.

Now, who in the heck can contradict that? Who? The President of the United States? The United Nations? You? No, no one can. Water is *tuu*. It's a language that my brother and I have. It's the Apache word for water, the life blood of my people. It has sustained us from time immemorial. It nourishes and sustains the plants, the animals, and the ecosystem—to use a modern word—upon which we live and strive.

We so happen to live on an aquifer that is called Coconino. Let's talk about the Coconino Aquifer. I'm sure it's on your agenda somewhere. It's right underneath my reservation and you have an industry just off the north side of my reservation. What are their names anyway—a big power producing industry? They are pumping water from the Coconino Aquifer. The hole must be very large, and they are using it.

Where does that power go to? Phoenix. We've been told that on the northern side of our reservation, in some places, there is a depression. What is going to happen when they pump up all the groundwater which lies under my reservation?

The trees will no longer grow. Their roots only go so far. There's a mass pumping going on, and you talk about water rights. That's where water

rights begins from: groundwater. It replenishes everything, replenishes the surface water so that I can continue to exist. The mainstream of the White River, where we all live.

We talk to the state ecosystem people—Clean Water Act, you name them—and there are a bunch of commissioners all over the place, I don't know what else they are called, all of these commissions; Clean Water Act, pure water, clean air, endangered species . . . Every one of them is aimed at my reservation: "How in the world can we stop Ronnie Lupe from going on and continuing building? That's against the law, Ronnie, you can't do that."

I've lived on my reservation all my life. We were going to build a dam on the White River called Miner Flat Dam. Maybe some of you have heard about that. We thought maybe we could survive with a small overhead, provide our own energy, and then provide water, gravity fed, to a big canyon on the other side of the mountain, where we have an area that can be farmed and built and then grow at White River in a community.

I don't remember who it was that came on our reservation when we were talking about it. The Bureau knows what I'm talking about. They know exactly what I'm talking about. All of sudden an endangered specie was created—really created—a little tiny fish called Loche minnow. I have never heard of Loche minnow in all my born days. I have never seen it. I will probably never see it as long as I live, but it just so happened to be right there in White River.

There's an endangered specie fish right there in what you're doing. So what do they do? They stop my project. I could go on and on and on. I wish the Federal Government would wake up and fund some of my projects. Roosevelt Dam started recently, and it's already finished. The walls have been increased so it can carry more water.

Miner Flat started long time ago, and I can't even get it off the ground. This was subsidized by your money and my money, too. I need help. I have a very long ways to go. I am the endangered species. If all of these endangered species can stop projects, we are in trouble with our development on our reservation.

If the groundwater continues to be pumped from the Coconino Aquifer at the north end of my reservation, all of the trees will die and where will I go? I will have no surface water left. I have over 400 miles of rivers and streams, created from our sacred mountain, not going through the reservation, right there on my reservation. All of those streams that flow from the White Mountain creates a big river called Salt River. Where does that go? Right here.

Many years ago our Apache people used to visit this area. We have an Apache name for Phoenix. It is called *estawowatel*. That means in translation, "as far as the eyes can see, the valley of Cottonwood trees." Mind you, no cottonwoods are now left. There were beautiful rivers here.

As a youngster, I was going to school just below South Mountain. Back in 1940, on the Gila River, we used to jump off a bridge and swim. We saw turtles and fish. The Pimas who live there used to fish there. Today I go back. It's bone dry. Is that what is going to happen to my reservation? We need your help, Commissioners. Do not allow this to happen.

I have a prepared speech. I hope that it becomes a part of your record. It gives insight into the modern times and what I have struggled through in many different areas. The conduct of the Federal Government has treated us in many, many different ways; the pumping of the groundwater, and I could go on and on, and talk with you at length.

Some of them are in litigation right now, adjudication that is going on right now. We are wrongly represented in the state adjudication. The W 1 and W 2 proceedings, of which you are all aware. We have a set of numbers, irrigable lands.

Why in the world is it that the BIA attorneys cannot accept my figures. I have studied. I have hired people; consultants, attorneys. We have good numbers. They don't want to use my numbers. They are practically giving away the rivers and streams rightfully belonging to the White Mountain Apache Tribe. We want that reversed a little bit. We want honesty. The game we are playing is so unfair, dishonest. There is bigotry in every way you handle, in every way you invite me in handling the water rights of my people.

The White Mountain Apache Tribe and other tribes, we are humble people, but we are aggressive. We are fast into the Internet changes. We will learn, we will sit down. We will learn your language. We will become attorneys. Give us time, give us time to develop. Leave that water alone that belongs to the White Mountain Apache. I know what to do with it. Our people know what to do with it. We have prayed so long, worked so very hard, so our people can survive into the future.

My people told me that many years ago, they were traveling. They knew where food was, which food and what food at a certain time of the season. They went to a place—they were in a hurry because they had traveled for so long. There was a spring. When they got there it was dry. The woman and the children started to cry because where can they get water? The next place was about another 30 miles, and they had exhausted all of their strength because that's where water was.

The men held their head down and they said, they prayed—all they could do. A vision was shown to them, "You've done something wrong, you did this to yourself. You think you can cross the world without water. From the day you left till you reached here, you forgot about me. I'm a part of you. I am your life." Word was said very strongly. In their mind, in their heart, they could hear. Let us not do wrong with water.

You're not doing this to survive. The luxury, greed, Fountain Hills. You're not using it for your children to survive, to cook with. You swim in it, naked. What else will you do with it, pleasure. I see it all over *estawowatel*, the Valley of Cottonwood. You're going too far, forgetting all about us—the aboriginal people of the United States, the Indian people, the American Indians. Please do not forget us, or you will find that one day that your spring is dry. We knew what to do. Do you know what to do if that spring goes dry? Apache Tribes know what to do.

Just a small explanation to you in respect and decency is coming from all of us—the Indian people: truly we are mad, we are disappointed. The intelligence that you brought here to North America, what are you doing with it? Use it wisely, be fair, equalize the balance.

Talking about negotiations and settlement. Indian tribes have suffered through those settlement and negotiations. We know what has happened. But tomorrow holds another day. Let's look at it with our decent minds and hearts so that you and I can live together as a human beings.

Comments of the President of the Navajo Nation

Albert Hale²¹

I feel very honored and privileged to address the topic that we are addressing this morning. It is a topic that is essential to the survival of all people, whether they be non-Indians or Indians.

It's particularly important to us who are living in the Southwest where water is critical, where water is survival. The topic that I'm asked to address is the perspective of the Indian Nations on that water. I'm deeply honored to address the Commission that has been established to review water policy and also to serve as an advisory group. I welcome you to this part of the nation.

The Navajo Nation is located in the northeastern corner of this state. The Navajo Nation is the largest Indian Nation in this nation in terms of population and land base.

While I was sitting here talking about perspective I was reminded of a story that I heard once before. It's about a dispute between a white person and a Navajo. The dispute was over which race is smarter, the white race or the Navajo Indian race?

The white guy says, "We are smarter because look at all the things that we've built, look at all the dams that we've built. What about you, Navajo, what have you done?" The Navajo just stands there and couldn't say anything.

Then the white guy finally says, "Look at all the things that we built, the computers. We even sent a man to the moon. What have you done, Navajo?" The Navajo just stands there and scratches his head.

Finally, the Indian says, "We are smarter and we are going to prove it to you. The way we are going to prove it is we are going to send a man to the sun."

The white guy stood there and was baffled by this response and finally says, "That's impossible. You can't send a man to the sun. That man will burn up before he gets there." The Navajo stands there, thinks about it for awhile and he finally says, "We are going to send him at night." Perspective.

I happened to be reading an article in the Las Vegas paper here last week. Don't ask me why I was reading a Las Vegas paper, but I was reading it.

²¹ President, Navajo Nation, Window Rock, Arizona.

There was an article in that paper that talked about an agreement between the Secretary of the Interior and the Governor of the State of Nevada.

Their agreement is to have the Interior Department come up with regulations about water banking. Under these regulations, the State of Nevada will be allowed to store excess water that belongs the State of Arizona. But there was no mention in the story of the Indian Nations; no mention of how Indian Nations will fit into that regulation. You've heard this morning from my colleagues how the Indian Nations have been forgotten in this process of adjudication and settlement of water rights.

You also have heard from learned people, attorneys, who say to us that the state of the law in America is favorable to Indian Nations: that we have priority, in terms of rights, to the water that runs down the river. Indian Nations have priority over anybody else. Well, I'm here to tell you that in spite of all of that, Indian Nations have been forgotten. The priority that has been created in the law is not applicable and does not seem to be followed when it comes to Indian water rights.

Let me give you an example: the Colorado River Water Storage Act and the compact of the seven states—Wyoming, Colorado, New Mexico, Utah, Arizona, Nevada, California. All of those states got together after the enactment of this law and they said, "Arizona, you have this much water, Nevada, you have this much water," and did all of that to all the states, those seven states at least. It was like that pitcher of water you have in front of you.

They took a glass and said, "This glass is your water, Arizona." And another glass for the States of Wyoming, Colorado, New Mexico, Utah, Arizona, Nevada, California. There was very little water at the end left in that pitcher. In this process nobody said, "Hold on, we have to take a glass of water out of the pitcher for Indian Nations, because they have prior rights." Nobody said, "Stop, let's do that first." The water was allocated so that there is very little water left in that pitcher. Then recently, with the enactment of the Endangered Species Act, we take another glass of water for the endangered species. Again, nobody remembered the priority that Indian Nations have in terms of rights to that water. So today it is sad for me to tell you that this process continues.

The Navajo Nation—and I'm the elected leader of that Navajo Nation—has been trying to quantify its water rights to the rivers that go across, or border, my nation. I understand that the Commission's responsibility is to review the water policy and the allocation and use of water, and then to come up with some way to coordinate the use of that water, because we all understand the limited quantity of western water. But I say to you, that you cannot begin to coordinate, to plan for the future until you have quantified Indian Nations'

water rights. We have attempted to do so. Recently, there was a dramatic change in the policy of the Navajo Nation with regard to the San Juan River.

Recently, I sent a letter to the Governor of the State of New Mexico. In that letter, I said to him, "It is time that we sat down and begin negotiations on how much of that water belongs to the Navajo people, to my nation. It is time." Before we had been basically getting ready for litigating, with tremendous amounts of funds and resources going into preparation for the litigation. What the litigation would result in? What would it resolve?

In my experience as a lawyer—and I'm sure all the lawyers would agree—litigation just spawns disputes. There are appeals, and there's a never-ending process it seems. But through negotiations we can finally settle all the issues that are related to that issue, and resolve them once and for all. Without a resolution to this issue, our economic development is impaired.

In 1962, the Navajo Nation agreed not to assert its water rights under the Winters Doctrine to San Juan River, so that water could be diverted from that river basin into the Rio Grande River Basin. Then the people from Santa Fe to Albuquerque and down could use that Navajo water. In return, the Federal Government promised us that they would build an elaborate irrigation system to irrigate over 110,000 acres of land for agricultural purposes. The Navajo Dam up above Farmington was built as part of that effort. The diversion for the water that was being diverted into the Rio Grande was completed in ten years, but the irrigation that was promised to us is thirty years behind schedule. Today, we continue to ask the Federal Government, "Please complete that project as you promised."

We use our limited resources to travel to Washington. I am just on my way back from Washington, D.C. lobbying for these moneys and others. Every year we remind Congress and the federal officials, "You have a treaty responsibility here. You have a contractual obligation here. You have a first contract with America that you must fulfill." Every year we do that, not only myself but also my colleagues. Federal leaders across the nation and Indian leaders meet, but the water that we are talking about continues to flow. And we continue to say, "That's my water," but we just watch it. When we try to do development, but the federal Government says to us, "We don't have the money for you." Or they enact laws, the Endangered Species Act as an example, that prohibit that development. We continue to struggle with that.

We are inhibited by these laws and regulations. To be able to use the water that belongs to us, we need help. Just like my brother said, we need help from the Federal Government and from the state government. We need the removal of the double standards that are being used. We need the removal of the positions, particularly with respect to Navajo water rights, that hinder equitable settlement of Indian water rights.

We are in negotiation to settle our rights to the Little Colorado River, but in that negotiation process we are running into that double standard. We are being told we cannot market our water in that settlement. We cannot have a provision in that settlement that will allow us to do that, but the non-Indians who are using that water don't have such a prohibition.

Where's the equity in this? Where's the fairness, the right to pursue life, liberty and justice? What happened to that? What happened to equal protection and due process under the law? Where is it when it comes to resolving Indian issues? We try to find a way to meet the federal Government's position that they don't have any money for water development—the development of our water for the benefit of our people. We try to find a way through water marketing, but we are prohibited. I don't think that is fair, and I want the Commission to know that that's the state of water rights as far as Indian Nations are concerned.

We'd like to market our water. We'd like to develop our water rights. We'd like to have wet water projects on our river. We'd like to have those inequities removed by the federal Government, and we'd like to have the claims resolved and our water rights quantified.

But in that regard, we need funding from the Federal Government, and we also need understanding from the state government. The state governments cannot continue to take hard-line positions. They must begin to understand that Indian Nations are, indeed, sovereign. They must begin to recognize and respect that fact; to have it as the foundation of negotiation with Indian people and Indian Nations.

They cannot, as they are doing in New Mexico, say that the negotiation has to be consistent with a master plan that was developed in early 1950s. It just doesn't work that way. As I said in the beginning when that pitcher of water was there, glasses of water were being taken, the first people and nation to have received a glass of water should have been the Indian Nations, but it didn't happen that way.

Now the question is what do we do? How do we find equity and fairness? How do we reverse the current trend? How do we reverse that practice? I believe that this is the Commission's function: to come up with some recommendations that will address reversing these trends. We will give you all of the recommendations that are necessary, and give you all of the ideas that we have. But we've done that before.

We hope that this Commission will not only hear us, but will listen to us. It does not take many words to speak the truth. I hope that you understand the situation we are faced with as Indian people and why, rightfully so, we

should be concerned about what is happening to our water. Rightfully so, because water is our lifeline. It is the survival of our people and our nation. If we do not do those things that are necessary to preserve and protect that water right, Indian people will become an endangered species.

So in closing I leave with you with the thought that it is important to understand that the nature of water rights for Indian Nations must not be diminished in the general adjudication systems of the states. Non-Indians possess tremendous political clout in Congress. They can prohibit development of Indian water rights, but we do not possess similar clout, and that's why we need help.

It is not fair for the courts to diminish tribal water rights through the "sensitivity" doctrine or even the "reasonable foreseeability of use" doctrine. The courts must follow those doctrines that have been developed and those mandates that are included in the *Winters* case, and which are also enunciated in *Arizona v. California*.

All we ask for, all that Indian Nations across the country and the Navajo Nation and the Navajo people ask for, is consistency and fairness.

Session II: Watershed Governance and the Management of Indian Water Resources

The Flathead Experience: Addressing Water Quantity and Quality Issues in the Spirit of Adversity²²

Clayton Matt²³

Background Information

- The Flathead Reservation is in the Columbia Basin, and the Flathead River runs through the middle of the reservation.
- There is a population of about 20,000 on the reservation, of which about 7,000 are Indians.
- The southern half of Flathead Lake, the largest, natural fresh-water lake west of the Mississippi, is within the boundary of the reservation.
- The Reservation has extensive groundwater resources.
- The Flathead Agency Irrigation Division, operated by the Bureau of Indian Affairs, operates over 1300 miles of irrigation canals and about 10,000 structures, including about fourteen reservoirs, two of which exist off the reservation.
- One of tribal government's 31 departments is the Natural Resource Department, which has four divisions and about 120 employees.

Issue One

- Management of tribal water is conducted under adversity, including technical adversity, administrative adversity, social adversity, political adversity, and legal adversity.

²² Summary of Remarks.

²³ Program Manager of the Water Administration Program at the Flathead Reservation, Montana.

- The adversarial nature of water issues results in the management of data to a higher standard—often to litigation standards.
- Adversity affects hiring, the tribe's freedom to work cooperatively with outside agencies, and tribal decision-making with regard to resource management.
- Tribes routinely deal with multiple federal agencies, including the Bureau of Indian Affairs, the Bureau of Reclamation, the United States Fish and Wildlife Service, the United States Forest Service, the Corps of Engineers, and the Bureau of Land Management.
- The adversity tribes face often comes from their dealings with these agencies, as well as from dealings with city, county, and state governments.
- Competing federal agency goals also help contribute to the adversity facing tribes.
- *Recommendation:* "It is imperative that there is increased [federal] consultation and dialogue with tribes. Communication will help define the tribe's goals and help the tribe to find how it sees itself in terms of sovereignty."
- *Recommendation:* "The federal government must provide consistent water resource management objectives while preserving the integrity of the tribal government as a sovereign nation."
- *Recommendation:* "The goals and missions of all federal agencies operating in Indian country should include language which requires agencies to carry out ongoing, meaningful dialogue with tribal governments."

Issue Two

- Many tribal programs depend on federal contracts, grants or tribal compacting of federal programs. Tribes also fund programs with tribal dollars mainly from tribal resources.
- For instance, the Reservation qualified for treatment as a state for water quality standards under the Clean Water Act (CWA) in 1995. The tribes established a Tribal Water Quality Ordinance and CWA water quality standards.

- Tribe also operates under the National Pollution Discharge Elimination System, which allows it to certify permits within the reservation boundaries for the EPA.
- These programs have come under attack by state and local interests.
- *Recommendation:* "We need support for tribal water quality and water quantity governmental authority. We also need support for tribal efforts to regulate point source and non-point source pollution, especially from federal irrigation projects."

Issue Three

- Montana established what it calls the Reserve Water Rights Compact Commission to negotiate with the Tribe over reserved water rights.
- When and if those negotiations cease to exist, then Tribe will be in litigation with the State of Montana for the water rights.
- Other issues have been in the water rights negotiation process. The State of Montana has put the Flathead Reservation on the bottom of its list of priorities, and it has not been adequately funding its negotiation process.
- Federal negotiation support funding has also been inadequate.
- Additionally, there is a growing concern about federal negotiating teams having enough authority.
- *Recommendation:* Tribal water rights negotiations and water quality programs must be adequately funded and legally supported.
- *Recommendation:* "A federal negotiation team must be adequately funded and represented by federal decision-makers. Only one federal water rights negotiation team should operate within the reservation boundaries. Federal water rights negotiations within tribal aboriginal areas should actively involve the tribes in that region."

Issue Four

- Federal management of Flathead Agency Irrigation Division is inefficient and leads to damage, such as extensive soil erosion, to tribal resources.

- *Recommendation:* "Federal irrigation managers should take appropriate steps to protect tribal resources and manage water more efficiently."

Issue Five

- Water resource conflicts lead to constant threats to tribal sovereignty, which take time, money and the Tribal Council's attention away from other pressing needs, such as the health, education and welfare of the tribal membership.
- *Recommendation:* "Settling jurisdictional and water rights conflicts will be key factors in the tribe's ability to shift its priorities. This would also allow us to focus on resource management, rather than managing to meet the constant challenges we face to tribal sovereignty."

The Deschutes Experience: Warm Springs Collaborations With the Public and Private Sectors²⁴

Jody Calica²⁵

Background

- Confederated Tribes have been sovereigns on their land for thousands of years.
- Their sovereignty is permeated by the spiritual and the sacred, which are and always have been inseparable parts of their lives, for the Creator led them in all aspects of their existence.
- Today their sovereignty is also represented by regulatory and other functions, with human law serving as a derivative of natural and spiritual law.
- For example, the Natural Resources Branch of the tribal government oversees forestry, fish, wildlife in parks, water and soils, range and agricultural, cultural resources, geographic information systems, and conservation enforcement.
- The Branch's responsibilities include overseeing the tribe's rights on the 640,000 acre reservation, as well as its rights within the ceded territory, which encompass at least ten million acres. That ten million acres encompass eight national forests, three BLM districts, fifteen counties, and twenty-two rivers.

Issue One

- One of the challenges facing the Reservation is to protect and maintain a homeland governed by home rule.
- This obligation is assisted by the federal treaty trust obligation, which includes the entire federal government.

²⁴ Summary of Remarks.

²⁵ General Manager, Natural Resource Department of the Confederated Tribes of the Warm Springs Reservation, Warm Springs, Oregon.

- Federal trust obligations impose a substantive duty on the U.S. to administer the trust by the exercise of such care and skill as a man of ordinary prudence would exercise in dealing with his own property. If an agency possesses greater skill than a man of ordinary prudence, it must use that skill to make the trust property productive.
- *Recommendation:* "The federal agencies clearly possess great expertise in the management of forest, watersheds, fish and wildlife, and therefore, must use [their] skill to manage the trust property, including fish habitat and water quality, solely for the benefit of the tribes . . . [They] may not trade off tribal resources in favor of other non-tribal interests, such as timber production."

Issue Two

- There is vast multiplicity and overlap of water resource management responsibilities at the state and federal level of government.
- Forty-two state agencies are involved in water resource management, including water conservation, water allocation, water quality, groundwater management, instream water resources, dams, reservoirs, hydropower, watershed and riparian use, wetlands, ocean resources, urban water management, flood management, and water planning coordination.
- Eighteen federal agencies have the same set of overlapping responsibilities.
- "So you consider the challenge that we've got as tribes or just citizens, if you consider those sixty agencies as chickens, and within the Deschutes River Basin there's forty-two plans, well, that's like trying to herd and sort sixty chickens to try to go through forty-two fences. The challenge is big; the challenge is real."

Issue Three

- Reserved rights can be a potent weapon for resource protection. Unlike most environmental protection statutes, they cannot be subordinated to other priorities.

- But there are policy considerations to be made before raising claims based on reserved rights.
 - Public relations may be a concern.
 - Reserved rights are vulnerable to judicial limitation and congressional abrogation or modification especially when their exercise may halt non-Indian development.
 - Tribes which rely on their reserved rights to fight financially or politically powerful groups should also be prepared for a nasty battle, including potential reservation disestablishment arguments.
- Various approaches may be employed in handling reserved rights claims.
 - Do nothing.
 - Big stick approach (fight other users for reserved rights).
 - Good neighbor approach (compromise).
 - Proactive stakeholder collaboration approach (work with neighbors to develop effective working relationships, alliances and partnerships, based on common visions, values, interests and goals).
- The last three approaches have been employed with some success by the Warm Springs Reservation
- *Recommendation:* "We need a broad-based tribal initiative, similar to what recently happened with the Endangered Species Act. We need leadership among tribes and tribal organizations. We need understanding and advocacy from entities such as the Western Water Policy [Advisory] Commission, to recognize that we have been here from the time of the beginning."
- *Recommendation:* "We also need to renew our spiritual reverence for the giver of all life, and that's water."
- *Recommendation:* "Finally, we need to build policies, plans and relationships that honor the ageless wisdom, that natural law, spiritual law and human laws must be balanced."

***The Missouri Basin: Meeting the Challenge of Perfecting
Indian Water Rights While Balancing Consumptive
and Instream Uses²⁶***

Richard Bad Moccasin²⁷

Background

- The Mni Sose Intertribal Water Rights Coalition is comprised of twenty-four of the twenty-eight Missouri River Tribes. It was formally organized and chartered by the Missouri River Basin Indian Tribes in January of 1993. The Coalition is organized to promote the health, education and welfare and economic development of the member tribes.
- The Missouri River, which is 2,466 miles long, drains one-fifth of the continental United States, or 338.5 million acres. Twenty-eight Indian tribes control over fifteen million acres of land within the watershed.
- Approximately ten percent of the Bureau of Indian Affairs service population resides in the Missouri River Basin. These twenty-eight tribes with about 125,000 enrolled members, have vested reserved water rights estimated to be seventy-five percent of the total flows of the Missouri River.
- The Corps of Engineers has built five massive dams on the Missouri River main stem. These are used predominantly for non-consumptive uses, such as navigation, hydropower generation, recreation and flood control. These dams and others have turned the Missouri's main stem into a series of large reservoirs above Sioux City, Iowa.
- The Corps has estimated that its Missouri River projects contribute \$1.3 billion to the national economy annually. The hydroelectric system contributes about one-half of that amount, or \$655 million.

Issue One

- During the construction of the Missouri River projects, eight tribes on the main stem lost 350,000 acres of land to inundation by large reservoirs. Tribes lost wooded bottomlands where their communities and their most valuable resources were located.

²⁶ Summary of Remarks.

²⁷ Executive Director of the Mni Sose Intertribal Water Rights Coalition, Rapid City, South Dakota.

- The tribes disproportionately bore the cost of these projects, but do not now receive a share of the \$1.3 billion annual economic benefits the projects provide.
- *Recommendation:* "The tribes are entitled to redress for the loss of Indian land and resources for the main stem dams, and for the use of Indian water to generate the hydroelectricity at the main stem dams. . . . The tribes should receive the revenues derived from the sale of the hydropower generated at the Missouri River Dams. . . . Congressional legislation is needed in this regard."

Issue Two

- Federal water projects and federally permitted mining, grazing and logging, along with municipal sewage, effluent and agriculture and range runoff have degraded the water resources of the Indian Nations of the Mni Sose Coalition. The ability of the reservations to provide permanent homelands to the tribal people, the foremost treaty obligation of the United States, is threatened.
- *Recommendation:* "The development of prudent natural resource management strategies is one of the most pressing challenges confronting the tribal councils today. The tribal governing bodies need access to information on water resource management technologies, water resource development techniques, and planning that achieves the tribal goals. . . . Tribes must develop natural resource inventories and natural resource water resource data banks to increase their ability to develop long-term planning and to monitor activities on the tribal homelands that will impact the quality of the tribal environment."
- *Recommendation:* Tribes need to continue to move from a passive role to an active role in protecting their tribal homeland. Tribes should develop capabilities to actively participate in water resource management activities on or near their tribal lands and should remain current on the user-friendly economic development strategy that will maximize the benefits of their water resources to the tribal members, and preserve the environment for future generations
- *Recommendation:* Tribes need to network with other tribes and federal natural resource agencies to remain current on water resource issues, management trends and new programs available to tribes.

Ute Mountain Ute Tribe Perspectives on Tribal Experiences and Initiatives—Southwest²⁸

Judy Frank-Knight²⁹

Background

- The Ute Mountain Ute Reservation is in an arid region of southwest Colorado and northwest New Mexico.
- Drinking water was trucked into the Reservation until 1990.
- Originally, the Mancos River ran through the Reservation, providing some water, but a reservoir was built north of the Reservation, blocking this source of water. The Bureau of Indian Affairs breached its trust responsibilities by allowing the reservoir to be built.
- The Tribe entered into a settlement agreement with Colorado in 1988, with tribal water rights to be delivered by two Bureau of Reclamation Projects. The cost of the projects was to be shared by Colorado. The Bureau of Reclamation portion of the settlement was signed into law by President Bush in 1988.
- The first project was the McPhee Dam on the Dolores River, about forty miles north of the Reservation. It was to provide water for the western portion of the reservation. The second dam, the Animas-La Plata Project, was to take care of water needs on the Eastern portion of the reservation.
- A provision of the settlement stated that if the agreement was not fully completed between 2000 and 2005, the Tribe could reopen the settlement in court.

Issue One

- As part of the settlement, the Tribe has received a water pipeline, but the Animas-La Plata Project has yet to be built, due to lack of funding from the federal government and environmental problems with the project.

²⁸ Summary of Remarks.

²⁹ Chairperson of the Ute Mountain Ute Tribe, Towaoc, Colorado.

- Environmental groups oppose the project on many bases, including compliance with NEPA and the ESA.
- Additionally, other Indian tribes have opposed the project because they have burial sites in the area where the reservoir would be.
- The tribe has been meeting monthly with all of the groups involved in the Anima-La Plata dispute, and is frustrated with the lack of progress, with the federal government's failure to exercise its trust responsibilities and with the failure of the previously negotiated settlement.
- The Tribe is concerned that future settlements are meaningless, since past treaty promises and the 1988 settlement have not been honored.
- *Recommendation:* The United States should fulfill its portion of the 1988 agreement.

Issue Two

- The Tribe has been working on an irrigation project, called the Farm and Ranch Project, for the portion of the reservation that now has water.
- Originally the project was projected to cost \$50 million, and the BIA told the tribe not to push for funding in the 1988 settlement talks because BIA could help pay for the project out of its irrigation line item.
- In fact, the tribe has only received about \$15 million, and it needs \$10 million to complete the project.
- The BIA now states that since the project was not part of the settlement, the BIA has no obligation to help the tribe complete it.
- *Recommendation:* The BIA should help the tribe with funding to complete the Farm and Ranch Project.

Shoshone Tribe Perspectives on Tribal Experiences and Initiatives—Northern Plains³⁰

John R. Washakie³¹

Background

- Reserved water rights of the Wind River reservation were upheld by the United States Supreme Court in 1989. Since then, the Shoshone and Northern Arapaho Tribes have made great progress in the administration and implementation of their water rights.
- The Reservation has become a nationwide leader in water rights implementation.
- The Wind River Reservation has 240 lakes and 1100 miles of stream.
- The Wind River Water Resource Control Board is a twelve-member board set up to administer the water code of the reservation and to oversee the administrative, regulatory and technical functions of the office of the tribal water engineer.
- The Board's responsibilities include reviewing cost share applications for private ditch and gated pipe programs, administering the irrigation rehabilitation program for the federal irrigation project, overseeing the safety of dams monitoring program, and coordinating compliance with the District Court water rights activities, including groundwater reporting.
- Last year, the Board completed twenty-eight diversion projects, and sixty-six gated pipe projects. Additionally, it did five major projects, costing \$4 to \$5 million, to improve the federal irrigation system.

Issue One

- Improved management of the tribal water supply on the reservation benefits fish and wildlife, both through improved reservoir levels and through higher, more consistent stream flows. Thus higher quality habitat, including wetlands, can be maintained.

³⁰ Summary of Remarks.

³¹ Chairman of the Shoshone Business Council at the Wind River Reservation, Ft. Washakie, Wyoming.

- As the number and variety of wildlife increases, the lifestyle of the local inhabitants improves, and increased income is available from hunting license fees.

Issue Two

- Throughout the Western United States, no water administration entity can operate without dealing with other water use or administrative agencies. The interwoven nature of the federal and state water rights requires coordination to allow the end-user to receive and use water for beneficial use.
- In the Big Horn drainage, there are tribal reserved water rights, tribal and individual-held state water rights, federal reserved water rights, federally-held water rights used by the Federal Government, federally-held state water rights used by the non-Indians under contract with the Federal Government, non-Indian state water rights and Walton rights.
- While this collage of interrelated rights appears to be unworkable, such is not necessarily the case. By coordinating with other agencies early in the irrigation season and focusing on known hot spots, most problems can either be avoided or readily resolved.
- While some water conflicts must be litigated to clarify the relationship between different rights, the Tribe has worked to limit such situations to those that cannot be resolved by any other means.
- *Recommendation:* It is important to get "all parties to agree on the facts which are occurring in the field, for example, having all parties present when gauging is conducted."

Issue Three

- The Tribe's Big Horn litigation was initiated in 1977 when the State of Wyoming sued all water right users within the Big Horn River and its tributaries. The adjudication is twenty years old, and it has progressed farther than any other ongoing adjudication. Based on experience with this adjudication, Washakie makes the following suggestions for those attempting full stream adjudications:
- *Recommendation:* The adjudication should proceed before a judicial forum. State administrative forums pose many problems. State staff will interact with state legal counsel, and the impartiality of the staff will be compromised. In addition, it is not clear to whom the state staff is

answerable. It is very important that the court be independently staffed with technical personnel to assist it with deliberations and fact finding.

- *Recommendation:* The adjudication should use existing rules of civil procedure. Each time special rules have been developed in the name of saving time and expenses, the end result has been exactly the opposite. Each special rule or procedure simply creates more opportunities for litigation.
- *Recommendation:* "The judge or special master needs to keep control of the litigation. While the parties should be encouraged to agree and make recommendations on how to proceed, water rights are hotly contested issues. Various parties have a vested interest in delaying the proceedings. The best way to resolve outstanding issues is to get them developed factually and legally with prompt rulings by the judiciary. This will allow the parties to better evaluate the risk of litigating their positions, thus encouraging settlement."

Lummi Tribe Perspectives on Tribal Experiences and Initiatives—Pacific Northwest³²

Darrell Hillaire³³

Background

- Reservation is in Washington State, about twenty miles south of the Canadian border, and is located next to the ocean.
- The Tribe is currently involved in negotiations over groundwater on the Reservation. Two aquifers lie below the Reservation.
- Washington State wants to characterize Tribe as an "interested party" in water forums, but Tribe should have more formal status, because it has senior water rights.

Recommendations

- *Recommendation:* A federal Indian water rights policy must be developed in concert with Indian people.
- *Recommendation:* The policy statement that comes from this Commission should have Indian reserve rights woven throughout, not merely included as a subsection or separate chapter.
- *Recommendation:* Tribes need to coordinate their long-range plans and policies toward water. Especially in litigation, it is important that tribes coordinate their efforts, since legal precedents often apply to all tribes equally.
- *Recommendation:* Tribes should begin their coordination with a definition of principles. Principles of progress, development, and growth must be balanced with those of equality and stewardship.

³² Summary of Remarks.

³³ Vice-Chairman of the Lummi Tribal Council, Bellingham, Washington.

Session III: The Water Settlement Process and Resolution of West-Wide Water Issues

*A Practitioners Perspective: Indian Tribes and the Federal Water Settlement Process*³⁴

*Robert S. Pelcyger*³⁵

Issue One

- Settlements are different and unique for each tribe, offering each tribe the opportunity to choose its own future.
- Settlements may emphasize agriculture, restoration of fishery, development of minerals, establishment of small businesses, promotion of crafts, tourism, recreation, joint ventures with high technology companies or other goals.
- *Recommendation:* A tribe must have a clear vision of its goals in the settlement process before embarking, or the process will be doomed. "If a tribe isn't sure what it wants, my advice is to stay away from the settlement process."

Issue Two

- Settlements are not easy for the Executive Branch of the Federal Government. They are difficult to manage, are essentially ad hoc and idiosyncratic, and they do not easily lend themselves well to a bureaucratic process. Additionally, they are expensive and require a great deal of coordination in ways that are difficult for the government.
- It is virtually impossible for the government to satisfy everyone in the settlement process. A number of entrenched federal interests are implicated by settlements, and any one of these interests may block a settlement.

³⁴ Summary of Remarks.

³⁵ Attorney at Fredericks, Pelcyger, Hester & White, Boulder, Colorado.

- Most successful settlements, at one stage or another, have been opposed by the Executive Branch of the Federal Government.
- Administration opposition has been overcome by persistence, perseverance, embarrassment, placing of holds on unrelated confirmations of federal officials, trading off votes, trading off appropriations, trading off military construction projects, adding Indian settlements to veto-proof bills, and by other familiar tactics of the political game.
- *Recommendation:* "One of the most vital components of a successful settlement is a very high profile political champion. Most settlements have had at least one, and most settlements have been driven not by the Administration, but by a congressional supporter."

Issue Three

- Non-financial forms of leverage and power may assist the tribes to negotiate successful settlements.
- For instance, the Pyramid Lake settlement was facilitated because the Pyramid Lake Tribe was in a position to control coveted water storage space in the federal reservoirs on the Truckee River System.
- "I'm convinced that this form of federal leverage, the utilization of federal programs, federal authorities, federal power, federal discretion, is going to be much more important in the future. The keys to the kingdom must pass through Indian tribes . . . if there is to be . . . a successful settlement policy."

Issue Four

- Creative means of financing settlements will become increasingly necessary in today's budget climate.
- For instance, one form of funding came from hydroelectric revenues from the Pick-Sloan project. Another form of funding was used to finance the Crow and Northern Cheyenne boundary settlement in 1994; the revenues that made that settlement possible came from the federal share of coal royalties from coal mines in Montana.
- These sources of revenue do not count the way appropriations count in the federal budgetary process, so they were funded without opposition from the Office of Management and Budget.

- *Recommendation:* "I think we have to be even more creative in the future about finding these kinds of new forms of federal currency, and also, where revenues are necessary, to obtain them in ways that will be compatible with the federal budget process."

Issue Five

- One of the "great dividends" of the settlement process has been to bring Indian and non-Indian communities together in new and unpredictable ways.
- Cooperation and partnerships have replaced long-standing conflict in some instances.
- It is exceptional for tribes to be in a position to reach out to their non-reservation community with charitable support, and in other ways. The settlement process may provide tribes with the economic ability to undertake such outreach.

A Congressional Perspective: Indian Tribes and the Federal Water Settlement Process³⁶

Michael Jackson³⁷

Background

- Since 1978, the settlement process has produced fourteen water settlements involving twenty tribes, bands, and communities in seven western states.
- Of the fourteen settlements, six are fully implemented, four are on schedule to be fully implemented, and four are stalled with difficult problems that may require additional congressional action to succeed.
- All of the settlements that have been done to date have rested on a basic bipartisan policy decision that negotiated settlements are vastly preferable to long and costly litigation. For tribes, litigation can take years to produce only a right to water on paper, without producing wet water. Litigation may not settle many crucial issues or provide for the means for tribes to develop their water resources.
- For the United States as trustee, negotiated settlements offer the best route to fulfill its duties to tribes while advancing the policies of Indian self-determination and economic self-sufficiency.
- Each settlement has involved a unique mix of people, history, culture, geography, hydrology, legal and political circumstances.

Issue One

- In 1993, after Bill Clinton was elected and Secretary Babbitt was appointed, the budgetary obligation of the eight settlements approved in 1990 and 1992 amounted to more than \$175 million.

³⁶ Summary of Remarks.

³⁷ Minority Professional Staff Member, Indian Affairs Committee, U.S. Senate.

- There was a growing concern shared by many tribes, by the Native American Rights Fund and by the Western Governors, that Office of Management and Budget (OMB) was beginning to raid Indian programs to come up with the money to pay the federal share of the prior settlements.
- This situation was resolved when Secretary Babbitt made an agreement with the OMB in which OMB would support budget authority for Indian water rights settlements apart from the BIA's budget up to an amount of \$200 million in a year. However, Congress still needed to enact these authorizations, which it has not since done.

Issue Two

- There have been no settlements produced by the water settlement process since 1992. The decline has been caused by turnover in the Department of the Interior and other federal agencies, the Interior Department's other high profile battles with Congress over natural resource issues, the new focus on balancing the budget in Congress, and the 1994 turnover in Congress, which reduced the depth of knowledge on Indian affairs among congressional leaders.
- Budget cutting began to hit Indian programs as well as other programs. Indian advocates in Congress were forced to play defense to fend off the attacks on basic Indian program funding and tribal sovereignty. In this context, water right settlements and the funding issues involved took a lesser priority.
- In the tight budget environment, there is a disincentive for the Department to negotiate water rights settlements, because they are expensive.
- Once again, the only likely alternative is to take the funding for settlements out of the budget of the Bureau of Indian Affairs.
- *Recommendation:* It is a "very untenable option [to have] the United States Government try to fund its legal liabilities to Indian tribes by cutting Indian programs benefitting all tribes. I submit that that's unconscionable and it's the wrong way to go."
- *Recommendation:* If the federal government will not provide funding for the settlement process, then effectively it has created a policy to support litigation over water rights. "If that's so, then I think the Administration and the Congress owe it to tribes and everyone else to say so."

- ***Recommendation:*** Tribes need to recreate the consensus in the Administration and the Congress as to why negotiated settlements are preferable to litigation. Tribes need to educate staff, members of Congress, and federal bureaucrats about tribal water issues, and Tribes should try to foster more communication and cooperation between the Executive Branch and the Congress on these issues.

The Clinton Administration's Perspective: Indian Tribes and the Federal Water Settlement Process³⁸

Robert T. Anderson³⁹

Issue One

- The Clinton Administration and the Department of the Interior have renewed their efforts to bring forward settlements that are realistic and that can make it through the Congress.
- New expectations are required in terms of the amount of money that will be available from the federal government to finance settlements. Expectations built up during the period of unbalanced budgets may need to be lowered. Money will not be available to settle all aspects of each case.
- *Recommendation:* The Justice Department and tribes may need to use litigation in select circumstances to turn up the heat on states, so that they will be more willing to settle and to share in the costs of settlements.
- *Recommendation:* "We need to be more creative to figure out mechanisms through which we can ensure that appropriations for Indian settlements do not unduly tax the BIA's budget. It's going to be difficult to justify taking money out of some other portion of the federal budget."
- *Recommendation:* "We have to be creative and look at all possible sources of funding, look at other ways, not just to provide funding, but to provide economic benefits to Indian country that would enhance the use of water for tribal economies. Those are the sorts of things that we all need to think about in the future."

Issue Two

- The Interior Department has twenty settlement teams to negotiate settlements, and thirteen implementation teams to implement settlements that have been approved.

³⁸ Summary of Remarks.

³⁹ Special Assistant to the Secretary, U.S. Department of the Interior.

- There is also working group on Indian water rights settlements that's composed of all the Assistant Secretaries, the Secretary, and the Solicitor of the Department of the Interior. This group gives final Department-level approval to all settlements.
- Settlement teams must consider the concerns of local and national interest groups. Concessions which may be acceptable to a given tribe may be opposed on the national level by other tribes concerned about setting damaging precedents.
- Depending on the nature of the controversy and the factors to be settled, the scope of the settlement may be broadened to include drainage-wide state and federal issues—including non-Indian issues—or it may be narrowed if there is a sharp conflict over groundwater or water from a particular source.
- The Interior Department is committed to a policy of negotiating settlements that can be implemented in the short-term, so that "we don't have to face the frustration of not being able to locate funding or water for development of a settlement in the future."
- *Recommendation:* "The Department is committed to working with tribes. We've got a firm commitment to the trust responsibility, we support negotiations, but at the same time we may need to consider whether and when litigation is necessary and appropriate to move things along. I think tribes deserve an answer in terms of whether negotiations are likely to succeed or not."

A Congressional Perspective: Indian Tribes and the Federal Water Settlement Process⁴⁰

Timothy Glidden⁴¹

Background

- Congress considers the settlement process to be broken and no longer of any value.
- There were no settlements from 1993 to 1996, and there will probably be no settlements in 1997.

Issue One

- There are three general paths that we can take to fix the settlement process:
 - Congress can take the authority to negotiate Indian water settlements away from the Executive Branch and have the tribes go back into court and litigate. This is not a preferable course.
 - The executive branch can overhaul the process as it stands now.
 - Congress can step in and take the negotiating authority away from the Department of Interior and create a new entity, like the Indian Claims Commission which existed from 1946-1979, to do the job. "I would very strongly think that that would not be the right way to go, but those types of ideas are now floating around."
- *Recommendation:* "It's always been my feeling that Indian trust responsibility is the responsibility of all federal officials . . . including members of Congress, by the way. And if we are going to meet that trust responsibility I think something is going to have to be done to get this settlement process going again."

⁴⁰ Summary of Remarks.

⁴¹ Counsel for Native American Affairs, Resources Committee, U.S. House of Representatives.

Gila River Indian Community Perspectives on Tribal Experiences—Southwest⁴²

Rodney B. Lewis⁴³

Background

- The Pimas and Maricopas are an agrarian society, having farmed the land on their reservation since before the time of Christ. Water is important to their economy, and it is also a basis for spiritual and cultural life.
- The tribes have been litigating their claims to waters of Gila River since 1935, in complex proceedings involving water stored behind Coolidge Dam, surface water, and groundwater.
- Currently, the Tribes are devoting time and attention to two major actions in federal and state courts. They are pursuing litigation pertaining to the Gila decree in federal court, and are participating in the Gila River general stream adjudication before the Arizona courts.
- Simultaneously, they have conducted, for the past ten years, intensive negotiation with at least thirty-one parties in Arizona, and with the Federal Government. Their agreed upon water budget is 653,500 acre-feet each year.

Issue One

- Our tribe and many others have been caught in situations where the federal support team for settlement negotiations collapsed. Funding was cut and staff were transferred.
- At times, the federal support teams have been staffed with people without the experience or knowledge base to perform their responsibilities effectively.
- *Recommendation:* The Tribe needs commitment and focus from the Federal Government, and needs people who can close a deal. . . . "A half-

⁴² Summary of Remarks.

⁴³ Member and General Counsel, Gila River Indian Community, Sacaton, Arizona.

hearted effort is more detrimental than no effort at all." Funding should be stabilized.

- *Recommendation:* The federal government should expedite its decision making process for settlement issues. "We have at least three crucial items on the table ready for decision by the Bureau of Reclamation Nothing is being addressed; nothing is happening. In the meantime we're sitting and waiting . . . for the decision to be made."

Issue Two

- The current administration is not willing to go to the mat with non-Indian interest groups to make the necessary hard decisions allocating additional water to Indian tribes and to Indian reservations.
- *Recommendation:* Tribes should establish an advisory group of tribal leaders to assist the Secretary and the Assistant Secretaries in making decisions. "This policy group would meet periodically, listen to the status, listen to the problems, listen to the complaints, but also keep an eye and monitor on the progress or lack of progress of the various Indian water rights negotiations, and perhaps even litigation."

Fort Belknap Indian Reservation: Perspectives on Tribal Experiences—Northern Plains⁴⁴

Thomas W. Fredericks⁴⁵

Background

- Water rights are extremely important to tribes because they represent the last opportunity for tribes to negotiate to make their reservations viable homelands.
- The water settlement process began during the Carter administration as a mean of developing "wet water" rather than paper water rights for tribes, and as a means of getting Congress involved in the process.

Issue One

- Almost every Indian reservation on the Missouri River has a federal dam on it.
- For instance, the Fort Berthold Indian Reservation's purpose was effectively changed by Congress from providing a homeland for the Tribe to generating hydroelectric power when portions of the Reservation were flooded.
- Indians have suffered gravely from this process. "We went from no welfare to almost 100 percent welfare at Fort Berthold because of those actions."
- *Recommendation:* Since tribes are now holding the water on their reservations to generate power, regulate navigation and control floods, rather than provide a homeland, tribes should receive some of the revenues generated from hydroelectric. "They then can attempt to have a viable homeland through the resources that they get from power generation and not from the development of an agricultural economy."

⁴⁴ Summary of Remarks.

⁴⁵ Attorney at Fredericks, Pelcyger, Hester & White, Boulder, Colorado.

Issue Two

- In settlement negotiations, it is a handicap that the federal negotiating teams do not have the authority to negotiate on behalf of the United States. Teams must get approval from Washington before making firm commitments. This slows the process of negotiations.
- *Recommendation:* "I think it is imperative that if negotiations are going to take place in a meaningful way that the federal team be given the right to bind and speak for the United States."

Issue Three

- "Another insight that I would like to [offer] is that the Secretary needs to make a commitment to water negotiations. It's his counselor that has held up negotiations, in my opinion, at the federal level."
- "Congress is still of the mind that they would settle. We have people in place in the committees that are willing to push for settlements, but settlements are not forthcoming from the Administration."
- It is counterproductive when tribes move forward with a settlement, and then try to get it approved at the state level, only to have the Federal Government oppose the settlement because it has not had the opportunity to address issues that the tribe and the state have negotiated. "That's happened in our most recent compact in Montana where the Federal Government testified in the state legislature against the compact."
- *Recommendation:* "We need to get a commitment from the Secretary that he wants to move settlements forward."

Issue Four

- While water settlements are very important to the future of tribes, there is very little funding in the BIA for the settlement process.
- "It's the kind of settlement that they can make that will make a difference in the lives of their people forever. So we need to have the very, very best of experts in negotiating on behalf of the tribes. And most of the tribes are dependent on the Federal Government to fund those studies."

- Additionally, funding is required to implement settlements. Previously, money was set aside in the budget process for settlements, but now any funding must come directly out of BIA's budget.
- *Recommendation:* It "is grossly unfair . . . to have Indian people pay for the settlement of claims . . . that the tribes have against the United States. In most cases, tribes are giving up substantial claims when they settle these water rights against the United States, and therefore, it should be the United States that pays and not Indian programs within the Bureau of Indian Affairs."

Issue Five

- There is a proposal for a special trustee appointed by Congress to manage the federal government's trust responsibilities to tribes. This proposal is flawed. "It seems like the special trustee is attempting to get into the normal trust responsibility for land and land related activities. And he's attempting to do so in a way and in a manner that I think is demeaning to Indian people."
- It appears as if this is a backdoor means of avoiding the government-to-government relationship between tribes and the federal government, so that the federal government will not have to consult with the tribes to approve agreements, like leases or contracts, which may impact the tribes.

Nez Perce Tribe Perspectives on Tribal Experiences—Pacific Northwest⁴⁶

Samuel N. Penney⁴⁷

Background

- The Nez Perce Tribe once occupied over thirteen million acres, including most of north central Idaho, southeastern Washington, and part of northeastern Oregon. In its 1855 treaty, the tribe reserved the exclusive right to take fish within the reservation, and the right in common with the citizens of the territory to take fish at usual and custom fishing places outside the reservation. The entire area affected by fishing rights is quite large.
- The Nez Pierce Tribe, with the U.S. on its behalf, has filed for claims for consumptive use on the reservation, as well as for agriculture, commercial, industrial, domestic, municipal uses. Additionally, it has filed for instream flow rights to support fish and wild life species which the tribe has treaty reserve right to harvest.
 - The United States and the tribe have already spent over \$10 million preparing these complex cases for trial. Full-scale litigation of these claims will cost the tribe and the United States well over \$2 million per year in the course of many years ahead.
- The Snake River Basin adjudication was commenced by the State of Idaho in 1987. It is possibly the largest general stream adjudication in the nation. There have been 175,000 claims filed so far in the proceeding.

Issue One

- Snake River negotiations are accomplished by tribal, state, and federal teams.

⁴⁶ Summary of Remarks.

⁴⁷ Chairman of the Nez Perce Tribal Executive Committee, Lapwai, Idaho, and Co-Chair of the Idaho State Negotiating Team.

- After each negotiating meeting, the team participants issue a joint press release. This provides accurate information to the press in order to help mitigate the problem, prevalent in many areas of the country, that "there appears to be an anti-Indian sentiment when you start talking about water rights."
- The teams have also undertaken the responsibility of updating the Idaho congressional delegation. "Whenever we make our trips to Washington, D.C., we contact our congressional delegation because at some point in time they're going to have to approve this settlement as well."

Issue Two

- There are numerous hydroelectric dams on the Snake and Colombia Rivers which impede the migration of endangered species of salmon. The Endangered Species Act does not go far enough in protecting these species, but federal trust responsibilities to the tribes for fishing rights would go farther.
- The tribes have proposed, through the Colombia River Intertribal Fish Commission, that some of the dams be breached in order to have more naturally flowing river systems.
- The political complexities and overlapping jurisdiction which affect the salmon make it difficult to bring all of the necessary regional interest groups to the negotiating table to talk about recovery programs "in a serious way." "We believe [tribal fishing rights] can be a vehicle to begin a region-wide ecosystem resolution to the salmon crisis."
- *Recommendation:* The Administration [must] corral all the necessary departments, in this case Commerce, Defense, Energy, Interior, and Justice, [to] come to a regional settlement in a way that will be helpful to the people in the region" while at the same time fulfilling "its trust responsibility to the tribes to restore the Snake River salmon runs."

Session IV: Enhancing the Role of Tribal Leadership and Participation in Shaping Federal Water Policy—Outlining a Water Resources Action Agenda for Indian Country

A Congressional Perspective on the Political Will and Wherewithal to Address and Resolve Indian Water Issues and Needs⁴⁸

Patricia M. Zell⁴⁹

Summary

- There is the political will and wherewithal in Congress to enact water settlements.
- Budgetary constraints are not a new constraints on the process; they have always existed. For instance, the Animas-La Plata and Pick-Sloan projects have been controlled by budgetary constraints.
- "Regardless of budgetary constraints, water settlements are a . . . a member of Congress' dream come true." There are time consuming, but in the long-run they save constituents years of litigation and millions of dollars.
- "Water settlements . . . are the best solution, because inevitably the process of water settlement shapes the behavior of the parties and the attitudes of the parties, so that rather than looking at one another as adversaries, they become partners in the process. They see themselves as partners in the management of a watershed."

⁴⁸ Summary of Remarks.

⁴⁹ Democratic Staff Director and Chief Counsel, Indian Affairs Committee, U.S. Senate.

**Majority Staff Director Indian Affairs Committee
U.S. Senate⁵⁰**

Gary Bohnee⁵¹

Summary

- A settlement can be successfully negotiated, pass in Congress, and yet still fail in the implementation stage. Animas-La Plata is a good example. Often serious issues still need to be resolved in the implementation stage, such as budgetary and environmental issues.
- *Recommendation:* Negotiators of settlements must remember that implementation is half of the total settlement process, and must keep "in mind the larger realities of both the budgetary and fiscal climate and environmental issues and others." One possible factor for future concern and consideration will be the President's new line-item veto.
- *Recommendation:* Focusing settlements on narrow issues, rather than on resolving "big picture" problems all at once, might be a good idea in some cases. The complexities of approving and implementing settlements which address numerous issues, interests, and federal laws are daunting.

⁵⁰ Summary of Remarks.

⁵¹ Majority Staff Director, Indian Affairs Committee, U.S. Senate.

An Interior Perspective on Federal Funding and Personnel Budgeted to Address Indian Water Issues and Needs⁵²

Hilda Manuel⁵³

Background

- The BIA has two specific funds that are dedicated and justified in the budget for water resource management development activities. The BIA gets about \$20 million in requests annually for each of these funds. They are:
 - The Water Management Planning and Pre-development Program, which is designed to help tribes with management, pre-planning and development of water and land resources.
 - The requests for funding from this money have increased each year, but funding for this account has been decreased \$2.4 million in 1996, and will be decreased an additional \$1 million in 1997.
 - The FY 1996 funding for the Water Management Planning and Pre-development account was \$7.9 million. This funding will pay for 126 studies and investigations that are related to preparation and/or quantification of water rights claims. It also pays for geographic, hydrologic and other studies that are needed in order to prepare Indian water rights claims.
 - Water rights litigation and negotiation activity funding.
 - FY 1996 funding for this account is \$11 million. The Bureau requested an increase for 1997, but funding was cut by about \$1 million. Requests for these funds is also increasing every year.
 - This money is used to fund studies and investigations to support surface and groundwater cases that are being litigated.
- The Bureau also has a \$2.5 million attorney fees fund, which it uses to provide fees for tribal attorneys if the Department of Justice determines that it cannot provide representation on a given case, and a \$1 million FERC fund, which is used for re-licensing. These two funds are almost entirely allocated at this time.

⁵² Summary of Remarks.

⁵³ Deputy Commissioner, Bureau of Indian Affairs, U.S. Department of the Interior.

Issue One

- Some tribes that have not been funded have expressed that they were not given a complete picture of how the ranking process occurs to prioritizing funding requests. The process is as follows:
 - Area managers are asked to prioritize the proposals for funding submitted by the tribes in their area. Then the Bureau prioritizes claims on a national level. The Bureau will ask the negotiating team chairs, the Interior Water Policy Council, and the Solicitors who are assigned to work on the case to provide input as to the ranking and the priority that the project should receive in terms of funding. The Bureau will also consider whether there are specific court orders that require the Bureau to prioritize one request over another. Finally, the Bureau will examine the likelihood that the case will move toward a successful negotiated settlement.
- *Recommendation:* It is important for those tribes that are part of a negotiation team to be in "continuous communication and contact with the members of the team. Especially the chair, because it makes a great deal of difference for the team chair of a negotiation team to be able to provide us information on where they're at, in terms of whether it's a situation where there is a real possibility of negotiating a settlement or whether it's a case where things just aren't moving and the parties just can't seem to get to the table and have any meaningful discussion versus a case where [there are] actual deadlines and where things are moving so quickly that we need to give that particular request high priority."

Indian Water Settlements: Do They Have a Future?⁵⁴

Robert T. Anderson⁵⁵

Summary

- The federal government has a policy supporting negotiated settlements, and is involved in most settlements because there is a McCarran Amendment proceeding in state court.
- Often non-Indian water users approach the settlement discussions from the viewpoint that they are entitled to have all of their existing uses grandfathered. This is an unacceptable stance to the federal government as a trustee, and these situations may require litigation. However, given the current make-up of the Supreme Court, this is an inopportune time to take an Indian reserved rights to the highest court. So many tribes are forced to make concessions in state forums.
- Given the current litigation climate, it is important to emphasize the potential impact of FERC proceedings. The Secretary of the Interior has mandatory authority under Section 4E of the Federal Power Act to prescribe conditions to protect Indian reservations on which hydroelectric facilities are located. "I think that gives us another weapon for protecting instream flow values in particular."
- ***Recommendation:*** It's crucial for funding, litigation, and negotiating that "tribes and their attorneys work closely with their team chairs and likewise get back to Washington, or invite people from Washington out to the reservation to look things over and get a first-hand view of what's going on."

⁵⁴ Summary of Remarks.

⁵⁵ Consultant, Office of the Secretary, U.S. Department of the Interior.

Letters of Testimony From Tribes

*Letter From the Walker River Paiute Tribe*⁵⁶

*Jonathan Hicks*⁵⁷

Background

- The Walker River Paiute Tribe has been active in Commission activities for several years, even sending delegates to Commission several meetings that did not specifically deal with Indian issues. It sent delegates to the Indian Water—1997 Conference, but they did not receive an opportunity to present the Tribe's concerns, which are distinct from those of other conferees. The Tribe felt excluded from the public participation process, and feels the Commission should invite tribes to submit additional information not addressed at the March Conference.

Recommendations

- Several of the tribes concerns, which the Commission should consider carefully and address in its final report to the President, are:
 - The United States must ensure proper administration of the *Decree, United States v. Walker River Irrigation District*, No. C-125 (D. Nev. 1936), as amended by, *Order for Entry of Amended Final Decree to Conform to Writ of Mandate Etc., United States v. Walker River Irrigation District*, No. C-125 (D. Nev. 1940), which decreed the Tribe's right to use water from the Walker River on lands within the Walker River Reservation. It is currently unclear whether Nevada or the federal government are monitoring water use from the river to ensure diverters are complying with the Decree.
 - The United States, and particularly the BIA, have a trust responsibility to ensure that all lands on the Walker River Reservation receive adequate water for irrigation and other purposes.

⁵⁶ Summary of Letter to the Western Water Policy Review Advisory Commission, dated April 10, 1997.

⁵⁷ Chairman, Walker River Paiute Tribe.

- Operation and maintenance of the Walker River Irrigation Project (WRIP) by the BIA must be improved. The Bureau should complete construction of WRIP. In fact, the BIA has completed none of its Indian irrigation projects.
- The Tribe is concerned that the BIA has reallocated funds away from the Phoenix and Carson City Offices to such an extent that the continued existence of the Tribe's Department of Water Resources is jeopardized. "This reduces the availability of technical assistance from the Bureau to the Tribe, and threatens to impact tribal sovereignty and self-determination."

Letter From the Owens Valley Indian Water Commission⁵⁸

Joseph C. Saulque⁵⁹

Background

- The Owens Valley Indian Water Commission (OVIWC) was chartered by the Owens Valley Paiute Indians in 1991 in order to: negotiate the Tribe's water rights with the federal government and the Los Angeles Department of Water and Power (LADWP); address the impacts of LADWP's water extractions and diversions on reservations; and improve water-related conditions on reservations.
- The Owens Valley's water resources have been severely affected by pumping and diversions of water by the city of Los Angeles. Los Angeles receives about seventy percent of its domestic water supply from the Valley. It has 360 wells in the Valley, which pump an average of 108,000 acre-feet per year of groundwater, resulting in declining water tables. "Los Angeles has sacrificed the Owens Valley environment for the sake of slaking the thirst of its residents."
- Los Angeles built a second aqueduct from the Valley prior to the passage of the California Environmental Quality Act (CEQA) in 1970. However, it did not expand its groundwater extractions prior to the passage of the Act, and this expansion must meet CEQA requirements. Litigation has been ongoing for twenty-four years in California state courts over CEQA compliance. In May 1997, a settlement was approved between Los Angeles and the local government of the Owens Valley, the County of Inyo, but the Tribes had no input into this agreement.
- The Tribes have off-reservation water rights that are affected by the settlement. In 1939, the United States traded land in the Owens Valley to the State of California for land which now underlies the reservations of the Bishop, Big Pine, and Lone Pine Tribes. In the trade, however, the United States reserved for the Tribes the water rights to the Owens Valley lands. The Tribes do not believe the settlement or the previous Environmental Impact Reports under the CEQA adequately recognize their off-reservation water rights, and they have entered into negotiations with the LADWP to resolve the conflict.

⁵⁸ Summary of Letter to the Western Water Policy Review Advisory Commission, dated June 2, 1997.

⁵⁹ Chairman of the Owens Valley Indian Water Commission, Bishop, California.

Issue One

- Federal funding and support for the Tribes' negotiations with the LADWP have been inconsistent and inadequate. Funding of \$219,000 per year was provided by the BIA to the Tribes in 1991-92, but no funding was received in 1993 until late Fall, when \$85,500 was allocated. In 1994, the OVIWC secured BIA funding of \$200,000 to initiate a groundwater monitoring program for the Owens Valley reservations, but this funding was given to the United States Geological Survey (USGS), rather than the tribes, and the USGS never implemented the system as promised.
- The OVIWC strongly feels that there have been inequities in the amount of funding provided to California Tribes. Since the California Tribes' treaties with the United States were never ratified, the BIA refuses to recognize their tribal groups. In 1989, the BIA's California service population was 28,815, while the 1990 U.S. Census count for California Indians was 236,078.
- "Based on the Operation of Indian Programs and the BIA's official service population figures for the years 1990 to 1994, California Indians are receiving only one-third to one-half the [per capita] funding received by all other Indians."
- *Recommendation:* The OVIWC has requested that Congress increase the BIA's Water Resources funding to \$10 million in FY 1998, with at least \$1 million earmarked for California Tribes for each of the next five years.

Issue Two

- The Tribes are also concerned with the federal government's commitment to the negotiation and settlement process. There have been no negotiated settlements in the past seven years, and implementation of past settlements has been fraught with difficulties.
- "Trust Responsibilities do not end with paper settlements; equity in the implementation of settlements is paramount."

Issue Three

- In addition to a federal commitment to negotiate, there must also be an incentive to opposing parties to negotiate. The threat of litigation has not been a driving force as of late, because litigation funding in the BIA is very limited.

- There must be an increase in BIA appropriations for litigation support, but this funding should not be offered at the expense of other BIA programs.

***Letter From the Colombia River Inter-Tribal
Fish Commission⁶⁰***

Ted Strong⁶¹

Background

- The Colombia River Inter-Tribal Fish Commission is composed of the Fish and Wildlife Committees of the Nez Perce Tribe, the Confederated Tribes and Bands of the Yakima Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Warm Springs Reservation of Oregon.
- These four tribes possess treaty reserved rights dating from time immemorial⁶² to take a fair share of fish destined to pass through the tribes' usual and accustomed fishing places. Arguably, they also have reserved rights to water quantity and quality sufficient to provide for healthy salmon runs.
- Salmon are the religious, cultural and economic lifeblood of the tribes. Despite the efforts of the tribes and the National Marine Fisheries service to conserve and rebuild salmon runs, the salmon populations in the Colombia river basin have declined drastically due to competing uses of the Colombia basin water.
- Currently the salmon runs in the basin are listed as endangered or threatened.

Issue One

- The Colombia River basin is currently being managed, at best, to provide for the bare continued existence of salmon, whereas the federal government should be managing the basin to provide adequate instream flows and water quality to fulfill the purposes of its treaties with the tribes.
- Hydroelectric interests in the federal Colombia River Power System perceive salmon as "costing" the power system forgone revenues and

⁶⁰ Summary of Letter to the Western Water Policy Review Advisory Commission, dated June 4, 1997.

⁶¹ Executive Director of the Colombia River Inter-Tribal Fish Commission, Portland, Oregon.

⁶² See *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir 1983), *cert. denied*, 467 U.S. 652 (1984).

additional power purchases. In fact, navigation and consumptive uses of the basin's water also "cost" power, but only salmon are singled out by these interest groups. The Bonneville Power Administration has urged that "fish costs" be capped to assure historically cheap power rates.

- "In essence, Colombia River salmon are being charged for the 'privilege' of being allowed to remain in the water."

Issue Two

- Although the Clean Water Act has significantly reduced point-source pollution into the Basin's waters, non-point source pollution sources stemming from poor land management practices continue to be a severe problem. Logging, grazing, and agriculture are widely acknowledged to be contributors to this problem.
- Hundreds of streams in Oregon, Washington, and Idaho are listed as "water quality limited" because they do not comply with one or more water quality standards.
- *Recommendation:* "In looking 20 years into the future, we recommend that the Congress craft a system where rivers are managed so that beneficial uses, such as fish, are able to survive and grow to healthy harvestable populations. . . . In 20 years, we hope that the doctrine of first in time, first in right will apply to Indians and their resources as it now applies to non-Indians and their resources. Finally, in 20 years we hope that we will all have learned that water quality will only be improved when we thoroughly and honestly employ incentives, penalties, and accountability on the part of those whose activities affect water quality."

***Letter From the Water Resources Department
of the Colorado River Indian Tribes⁶³***

Gary B. Hansen⁶⁴

Background

- The most important water issue currently confronting the Colorado River Indian Tribes (CRIT) is the lack of funding for major repairs and upgrading of the Tribe's Irrigation System.
- The CRIT Irrigation System irrigates about 80,000 acres of land, providing up to \$80 million dollars in crop revenues each year. This money provides the main economic support for the Reservation and the surrounding region.
- The System failed catastrophically in 1989, resulting in extensive crop losses due to lack of irrigation. A Congressionally-funded study developed a rehabilitation plan for the System. The first half of this plan will cost \$30 million. Congress has appropriated \$3.5 million thus far, but funding was stopped in 1996 and no more funding is forthcoming.

Issue One

- Funding may only be raised through three sources: increased user fees, water marketing revenues, or congressional appropriation. Increasing user fees is unfair and impractical, as it would place the burden of repairing forty years of federal mismanagement on existing users, who would then be unable to farm profitably.
- Water marketing might feasibly pay for the rehabilitation of the System, while reducing the demands on the federal budget and maintaining reasonable land-use costs for lessees, but there is no clear authority to allow tribal water marketing and several Lower Basin States have stated they are opposed to such marketing.

⁶³ Summary of Letter to the Western Water Policy Review Advisory Commission, dated June 5, 1997.

⁶⁴ Director, Water Resources Department of the Colorado River Indian Tribes, Parker, Arizona.

- ***Recommendation:*** "I recommend that the Tribes be given clear authority to market their water as they see fit. I also recommend that the Bureau of Indian Affairs specifically support our Irrigation System Rehabilitation and that Congress be given a detailed list of the past-due needs of the Tribes with a recommended schedule of appropriations."

Letter From the Jicarilla Apache Tribe, the Pueblo of Santa Ana, the Pueblo of Laguna, and the Pueblo of Taos⁶⁵

Jessica R. Aberly⁶⁶

Background

- The water development history of each tribe is summarized below:
 - Jicarilla Apache Tribe: The Jicarilla Apache Tribe Water Settlement Act of 1992 ended seventeen years of litigation over the Tribe's claims to water in the San Juan River and Rio Chama Basins. The Act provides the Tribe with 40,000 acre-feet per year and a six million dollar water development fund. However, the Endangered Species Act currently precludes the Tribe from diverting water from the Navajo River.
 - Pueblo of Laguna: Adjudication of the Pueblo's water rights in the Rio San Jose has been ongoing in state court since 1983, with a focus on summary judgment motions through 1995. A federal negotiating team was appointed in 1995, but BIA funding levels for negotiations are so low that negotiations have ground to a halt.
 - Pueblo of Santa Ana: Adjudication of the Pueblo's water rights in the Rio Jemez basin was initiated by the United States in federal court in 1983. Special master's reports pertaining to the Tribe's water rights were filed in 1988 and 1991. The Tribe objected to both reports and is still awaiting a ruling on its objections. A federal negotiating team was appointed in 1993 to help settle the claims, but despite significant progress in 1996, only \$15,000 was allocated by the BIA to continue the negotiations in FY 1997. This will only cover a fraction of the cost of the technical work required to continue the negotiations.
 - Pueblo of Taos: Adjudication of the Rio Pueblo de Taos and the Rio Hondo Stream Systems began in 1969. The Pueblo's claims were

⁶⁵ Summary of Letter to the Western Water Policy Review Advisory Commission, dated July 9, 1997.

⁶⁶ Attorney at Nordhaus Haltom Taylor Taradash & Frye, LLP, Albuquerque, New Mexico, representing the Jicarilla Apache Tribe, the Pueblos of Santa Ana and Laguna, and serving as special counsel for water matters for the Pueblo of Taos.

initially held in abeyance in the hopes that *State of New Mexico v. Aamodt*⁶⁷ would provide a helpful precedent. Aamodt has not provided the resolution initially anticipated, so the Pueblo intervened on its own behalf in 1985. The hearing on the Pueblo's historic and existing use claims is set for early 1999. A federal negotiating team was established in 1990, and negotiations with non-Indian users are ongoing.

Issue One

- The tribes are "deeply concerned about the slow progress of water rights settlements and the lack of funding to support negotiations and settlements. . . . Tribes cannot afford to spend fifty years in court in order to secure their water rights. While general stream adjudications drag on for years, non-Indians continue to develop the waters to which the tribes are entitled."

Issue Two

- Federal funding, which the tribes need for legal and technical experts, is primarily linked to the adjudication process. It is unacceptable to put tribes in the position of having to litigate in order to get needed moneys. Litigation cannot assure "wet water," and often it cannot even assure a "paper" water right.
- Cooperative regional water planning forums do not offer an alternative to these funding needs because the forums and the tribes have different planning horizons (40-100 years for the forums versus "forever" in the case of the tribes). Additionally, tribes need federal funding to acquire expertise in order to participate in these forums.
- *Recommendation:* "The Commission should recommend that BIA funds or other federal funds for Indian water rights negotiations not be linked to "active" (a relative term) adjudications *only*."

Issue Three

- The Administration has no clear policy on how to best resolve Indian water rights claims. Federal negotiating teams are not adequately funded.

⁶⁷ 618 F. Supp. 993 (1995)..

- *Recommendation:* "For negotiations to succeed . . . the administration must be willing to commit sufficient time and money to the process and must devote resources to bringing pressure to bear upon the non-Indians to negotiate without necessarily resorting to the lengthy general stream adjudication process." The Administration must also put political pressure on non-Indians to pay tribes for the use of their waters.
- *Recommendation:* One option might be for the United States to enforce tribal senior rights in more limited litigation settings, such as federal court declaratory actions on the senior rights.
- *Recommendation:* "A consistent vision throughout the federal legislative and executive branches emphasizing negotiations, and sufficient funding to support that vision, [is] sorely needed."
- *Recommendation:* One potential source of funding would be to establish a settlement fund derived from revenue from the sale of hydroelectric power throughout the West. The operations of various dams throughout the West occurred at the expense of Indian tribes. The Commission should recommend an equitable redistribution of these dams' revenues to fund negotiations and settlements.

Issue Four

- While the era of big dam construction in the West may be over, there are still smaller-scale projects that might greatly benefit tribes, and these should be advocated.
- For instance, a "small off-stream reservoir (perhaps in the range of approximately 4,000 acre-feet) in the higher elevations of the Rio Jemez could assure settlement of the water rights claims of Santa Ana's Indian and non-Indian neighbors."

Issue Five

- Tribes should have the right, and the *option* to exercise this right, to market their water.
- In particular, the Jicarillas believe that marketing of the waters of the Colorado River is consistent with the Commerce Clause and can be structured in a manner that will not undermine the Colorado River Compact's allocations.

Issue Six

- Under the Endangered Species Act, Tribes should not be asked to shoulder an unfair portion of the responsibility for protecting species that have been placed in peril by prior non-Indian development.
- *Recommendation:* "The Commission should recommend that, if tribal water rights have been adjudicated or are in the process of being adjudicated, those rights or the Tribe's claims, as submitted to the court, must be part of the environmental baseline" in the ESA Section 7 consultation process. Additionally, during the recovery process, tribes' reserved rights should not be treated as unperfected state appropriative rights subordinate to existing state water uses.

Comments of the Secretary of the Interior⁶⁸

Honorable Bruce Babbitt

I appreciate the tone and spirit of [my] introduction and I recognize that there have been some sharp questions and some pointed criticism. Nonetheless, I appreciate the admonition in [my] introduction that what we're about is trying to get these issues resolved, and I just want you to know that for my part, I accept that challenge and am, therefore, going to see if I can point towards some directions that can take us out of this season of obvious discontent, of frustrated expectations and, indeed, of uncertainty about where we go in the future.

But first, I think I should just acknowledge and say I appreciate, as do we all, the Western Water Policy [Review Advisory] Commission for sponsoring this, and Dick Trudall for once again doing what you do so well, which is providing a place and a forum in which time and time again we have managed to widen the common ground as a result of being honest, candid, listening carefully and attempting to move it forward.

Now, what I'd like to do briefly, I think that in order to look to the future, this is one case where we must look back and examine the events of the last 20 years in a little bit of detail because I think, at least in my case, it helps illuminate what the issues are and why it is that the season of discontent has set in. So if you'll allow me, I'm going to spend some time talking in a fair amount of detail, not too much, because I know this meeting is being transcribed, and I'm not eager to be sitting in depositions explaining what I said on this day in Phoenix, Arizona. So I'll try to walk that line as carefully as I can.

I do want to talk about where we've been and the reason I want to do that is to see if I can help identify the factors that have changed in the last ten and even twenty years, and then see if I can—in a tentative way—suggest how it is we can respond to the political, economic and institutional changes that have taken place and perhaps shed a little light on where we might go.

I'm going to start with ancient history. I'm going to start with Arizona history, and the reason is that the water settlement process was invented in Arizona beginning in the late 1970s and flowering in the most dramatic way in the 1980s. It was born and it flowered in Arizona even as it has not really taken root to this day in other states.

⁶⁸ Made during the March 18th session of Indian Water—1997.

We have a water settlement in Colorado called Animas-La Plata, which is mired down in an enormous set of difficulties. We have a water settlement in Utah from the 1980s which still has got all sorts of loose ends hanging out. There have been virtually none in New Mexico, very few in California. And the reasons, I think, bear examination because they may provide us a little bit of light for the future.

I was, of course, the Governor of Arizona—just in case you've forgotten that during this time—and as Governor of this state, I participated in various ways in every single one of the settlements, such as the Ak-Chin settlement, the Southern Arizona water rights settlement, the San Carlos settlement, Salt River, the Yavapai/Prescott Tribe.

And what I now invite you to reflect on is why did those settlements come so easily? Now, let me just say that they didn't come easily, and we need to sort of be careful and cautious as we go back and look at history because none of them were easy. They all took years. Many of them went back to Congress two or three or four times and some of them are still being re-tooled today, but, nonetheless, we did make a lot of progress. Why? Apart from the presence of the Governor of Arizona in the golden age of Arizona governance which has since entirely evaporated.

Okay, the first problem: in the 1980s, in Arizona, we had a lot of leverage—big-time leverage—because everyone in Arizona was desperate to get a reclamation project built. And in the 1980s, there was serious question whether that project would really move to completion. And it was leverage in the hands of all of the non-state parties, including my predecessors, congressional committees and others, which time and time again provided a stick for moving with these settlement issues.

That kind of leverage today, in a post-reclamation era, is not so easy to find. That's number one. The second thing that drove a lot of these early settlements was perception. I'm not talking about reality, I'm talking about perception. There was a perception in this state, where these settlements were crafted and born, that we were running out of water, and the perception in the non-Indian community was that we had to get these settlements right away in order to assure a water supply for this state.

Some of you old-timers may remember that famous year when Wesley Steiner, the State Water Director, went to the league of cities and towns and said the Colorado River Aqueduct is going to run dry the minute it's built, and you'd better go out and raid every groundwater basin in Arizona. And the cities rushed out and spent tens of millions of dollars all over this state buying up groundwater basins. The important thing about that was not the reality, it was the perception. For the sake of certainty, for the sake of cooperation, these settlements had to be, had to be driven to conclusion.

Now, today that perception in Arizona is largely diminished. The perception in Arizona is now is there is too much water and that they're looking for ways to sell some of it to Nevada, to do groundwater recharge, to sort of hang onto it. And all of the parties who are pushing so hard, driven by this perception, have all kind of slackened off and stepped back and said, "Well, why should we worry about settlements. There's plenty of water, there's no crisis, so we can always do this some other day." Okay, that's the second one.

A couple of examples of that: The San Carlos settlement was driven, in some large measure, by the perception of the City of Scottsdale that they needed to lease that water, that there was an intrastate market. This made a big difference.

The Salt River settlement was driven by the participation of the Salt River Project for a whole variety of reasons which related to the stability and nature of their water supply. Okay, leverage; perceptions.

The third one that I would reflect on, and I'm going to come back to these—this isn't just history. It's trying to understand what drove these water settlements. The third one was expectations. The expectations in the 1980s were that there was a lot to lose if they didn't settle. It was driven by a perception of a litigation threat that was perceived as very real in a string of Supreme Court decisions which gave real meaning to reserved water rights, meanings that were read and deciphered and understood in the non-Indian community.

Well, I got to tell you something, there's now a perception in the non-Indian community that we're not going to litigate. That we have become so bound up with the concept of settlements, that there isn't any rush because litigation will be stayed, everything will remain on the status quo, and the driver of being in the courthouse before a judge, as a threat and a motivator, has largely dissipated. Ironically, this is kind of a result of much of the success, a feeling that Congress will pay any price for a settlement, and that it will always be available.

Now, where you can see that today is in the Little Colorado River negotiations, and at the risk of inviting myself into a deposition, I'm going to talk about that because it's on the minds of many of you. We've been working in the Little Colorado River adjudication under the direction of a very talented settlement judge, a very talented trial judge, especially talented, I appointed him to his job, and we have been in close negotiating. What's the problem? The problem is that the non-Indian parties are offering nothing, nothing. The non-Indian parties are saying, "We'll settle if you will make us whole—100 cents on the dollar."

The current position of the Phelps Dodge Corporation at Blue Ridge, which is subject to litigation claims by the tribes, the current position of the Phelps

Dodge Corporation is, "We'll let you have water from Blue Ridge, but we want an equal amount of water at the same cost, delivered curbside at our Morenci Smelter. That is, it is our perception that there is no risk to the status quo at all, none, and therefore, unlike the 1980s, we ain't giving nothing."

Now, trot down to the State Capital in Phoenix, where in the 1980s the state government was saying, "Yeah, we recognize that we got to pony up." You'll be met in the State Capital today with silence. Now, you can take that out on John Duffy, but I'll tell you something: it ain't John Duffy's fault. It's a much broader issue, and we've got to confront that issue. The fact is that we're dealing with a perception that we never litigated, and the people are under no threat of having their position undermined by successful assertion of a reserved right.

Now, I don't know and I'm not about to propose how and when and where tribes, the Justice Department, the Interior Department and all the other players may decide that it's time to take the gloves off, but I can tell you something; in my days as a trial lawyer, I knew what happened when the other party thought I didn't want to go to trial. I can remember the cold sweat when I got up one morning and said, "The reason why we're not settling this is because they correctly believe that I don't want to go to the courthouse. And they can read it in my gestures, they can read it in my body language when I negotiate.

"They can look over my shoulder at the lack of preparation. They say Babbitt's doing other stuff. He doesn't want to go near the courthouse." So all of a sudden you've lost all your leverage. It's something we've got to worry about a whole lot.

Okay, money; you've all been discussing money. I understand Mike Jackson and Glidden and these guys are giving me a bad time about that; is that right? They're criticizing this Administration? Okay, well, I promised I wouldn't stoop to that level of demagoguery, but I probably will. But not really, because this issue of money is serious, and we've got to acknowledge it and figure out what we can do about it. Now, the budget problem is there and we can spend all of our time quarreling about whether the problem is OMB or the problem is the United States Congress. But I can tell you it ain't going to make any difference, because we are locked into a budget-reduction dance, which is backed up by 602B budget allocations, which are backed up by a process which is not going to change.

Now, if my good friends from the United States Congress say, "Well, that's the Administration's fault because they're not asking." I would with all

deference as friends among friends say, "So that's why you cut \$200 million from the BIA budget in 1995? \$200 million, come on?"

Okay, now, I don't want to get into that kind of stuff because we're in this together. The bottom line is this; whether it's OMB or our friends—our remaining friends—in Congress, for the purposes of fellowship, I include all these people here in the front row as our friends in Congress. They are; they're here. We can add them all up, and we're not going to change that reality.

And appropriation requests, well, to the extent they're granted, will simply be subtracted from the BIA's baseline. That's the way the process works. And I must tell you there are some people in the United States Congress who would be very happy to fund water settlements with offsets from the BIA budget. And I'll tell you why: because there are a lot of people in the United States Congress who want to get rid of the Bureau of Indian Affairs. It's coming at us. Frank Ducheneaux is right about this one.

Do you want to know what the game plan is? How many of you subscribe to Frank's newsletter? Okay, well, I don't mean to hawk business for Frank Ducheneaux, but you'd better start reading his newsletter because he's right about the threat to the BIA. And one of them is that you simply take a water settlement and take two or three hundred million dollars out of the BIA's budget—finance four or five of them. What does it do? It moves tribal priority allocations down to zero and cuts that historic trust link, not by saying so, just by doing something else. The water projects are done, and the Bureau of Indian Affairs is gone. So we've got to think about that one very, very carefully.

Now, the last problem that I've already adverted to is the political clout. These settlements in the Eighties worked because, to use a somewhat unfashionable word, we were triangulating, not Dick Morris style, not in the Jefferson Hotel, but we were triangulating. And the reason was that we had a base in the Interior Department, in the United States Congress, and in the state, its political subdivisions and the large water users. When you can think back to that, we had Mo Udall in the United States Congress. That's all we needed, that's all we needed—his stature, his tenure, his moral authority was there.

The Interior Department was playing a strong and productive game. The parties in Arizona, for all the reasons I have described, were ready and eager to make concessions which are the fundamental requisite of settlement. They believed that the alternatives were worse, and that it could happen.

Okay, now, having gone through that melancholy tale of the decline and fall—or the withering, if you will—of the water settlement process, what are

we going to do about it? Well, we've given this a lot of thought, and we need to give it a lot more. And I understand your desire for consultation and we'll do that as we have to. Let me propose just two or three things that we need to think about, and I'm sure that they've already been discussed in some measure.

In the areas where we are making progress, increasingly the progress is tied to regional solutions. You see, we no longer have the leverage of a CAP and giant reclamation projects and Animas-La Plata has taught us a melancholy lesson. That even when you get these partnerships for water development going, they can sort of blow up in your face.

What we need to do is look even more broadly and ask how it is we can wrap solutions into large-scale regional efforts; not just a dam, not just a settlement, but entire river basins. Now, I'm going to point to Bob Pelcyger, because he calls me up once a week and I call him back once a month, and he's right here in the front row, and he's saying, "What about San Luis Rey?" And I'm saying, "I'm glad you had your hand up, Bob, because San Luis Rey is a perfect example."

This is an authorized water settlement in Southern California. It is not yet consummated. It's been sitting on the front burner for eighteen years. Now, I can tell Bob Pelcyger that the San Luis Rey settlement is, without any doubt whatsoever, going to be effected according to its terms. Why? Because I went to Las Vegas last December and made a speech to the lower basin states—California, Arizona and Nevada—in which I laid out some important unaddressed issues. And all three states, I think, got the message, and I left one paragraph in that speech and that is none of these steps will be closed without San Luis Rey. We can deliver on that one because the steps will be taken.

Every one, once again, has a vested interest of making that happen. I think that's reason for optimism with the Gila River issues which have been so frustrating here in Central Arizona. I came near to making a mistake in 1993, because I didn't see this in its sort of large formulation.

We came very close to settling up with the Central Arizona Water Conservation District over some unpaid bills, about \$500 million I think—it may not be quite that much, maybe a couple hundred million. Rod Lewis and others came and said, "You can't settle that dispute until we've addressed the issues of governance in the Central Arizona Water Conservation District." And the issues for governance are important because that is the point at which we not only talk about our claims as adverse parties, but in which we join the establishment which makes the decisions.

And so tracking that all through, I came out here one day in the summer of 1993 and ate crow and the Governor stood atop of the capital building and said, "He is a no good"—well, it's out there. I don't need to quote it.

But the fact is that I had realized that the assurance for this project is now related to everything that happens in the State of Arizona. Well, there are some important examples emerging on the Columbia River in the Pacific Northwest where I think we are making some real progress.

What we have, together with the tribes, come to understand on the Columbia River is that adjudications probably are not sufficient because the real issue is fisheries. It's not a desert, Arizona-New Mexico-Utah-Colorado problem. It's a fisheries issue, and litigation and adjudication against a traditional background may not be enough.

And, finally, we need to look in the context of the entire river basin and begin asking how it is we do mitigation, with the assistance of the Northwest Power Planning Council, and what it is we're going to do about the proposals to break up the Northwest Power Planning Council, and what the role of the tribes should be in that Power Planning Council and its successors. And what we're going to do about the hydropower issues; a financing issue which has been, I believe, under-appreciated and under-investigated in much of this.

We are making progress on the Columbia River in the Endangered Species Act, thought by many to be an obstacle. In the case of the Pacific Northwest, it is a powerful tool which may provide many ways of resolving these issues that are more effective than a classic adjudication.

Let's talk about what lessons I think might be learned from my description of the funding issue. I think the first conclusion that you've got to draw from this funding impasse is that while it's important to continue to think and advocate about traditional funding, things do change. They may change. I don't believe they're going to change on my watch, but they could.

Where else do we go? Well, first of all I think we need to look at other federal funding sources not previously utilized. The first one, somebody, I think you may have already discussed is the Bureau of Reclamation. Now, why is that important? That's important because of the technical budget rules that drive the United States Congress. The Bureau of Reclamation is not in competition with the Bureau of Indian Affairs. Everything else in the Interior Department is in direct one-for-one competition with the Bureau of Indian Affairs and anything outside the Bureau of Reclamation can be a zero-sum gain in which any water settlement money is subtracted from tribal priority allocations or whatever. The Bureau of Reclamation rests in a different budget cluster before the Senate Energy Committee and its

equivalent in the House. And that means that it's reasonable and appropriate to proceed on that basis. We have looked at a number of proposals to go that route in Missouri.

Once again, we have the enduring tangle of Animas-La Plata, but at least it's positioned before that committee which is the appropriate place. We are moving on the Gila River water distributions systems, at long last, and that is moving along and the reason is that it's sitting in front of the Bureau of Reclamation budget cluster, and I think we need to examine very carefully how it is we can move appropriately into that budget cluster, and how it is we can structure wet water solutions which avoid the potential and real problems of Animas-La Plata.

I think we need to look carefully at hydropower solutions. They're not solutions, but they are possible sources. Hydropower in the West has traditionally been fenced off from all other kinds of things except for the basin funds to which it belongs.

I, however, learned in 1982 an interesting lesson when the contracts for Hoover Dam, when the 50-year contracts expired. I went to the Congress and said, "We would like to capture a piece of those hydro revenues for the Central Arizona Project."

The response from Congress was, "That's never been done. It's impossible." But it in fact happened, and it happened, in my recollection, because somebody was kind of in the mood to give a going-away present to Senator Goldwater. And we had always gotten along wonderfully well, and to the amazement of everybody, Senator Goldwater was in one of his wonderful sort of "Bruce Babbitt is my adopted son" kind of moods and we got it.

Well, that's going to be a big issue in the northwest because we're already doing mitigation in some fish stuff out of the stream of revenues through the Northwest Power Planning Council. That's all headed up toward a big reassessment, and it's going to be both a danger as utility companies attempt to break apart transmission, generation and mitigation. It's also an opportunity. And it could be an opportunity in other river basins as well.

I suspect you've talked about the Justice Department judgment fund. It's an appropriate issue for us to examine together. It's not a panacea. There are limits. The Justice Department is very jealous of its judgment fund, and they have lots of ancient history about why it can't be done. But the bottom line is it can be done, and the only question is how and when and to what extent. Not a whole lot, maybe but perhaps some.

I understand you've been asking questions about David Hayes. Why did I select David Hayes to be counselor in the Interior Department and why have I put him in charge of the negotiating committee. Well, let me tell you why.

The first decision I made was to hire David Hayes because when he walked through my office I said, "This is one person that I can't let go. I should be so lucky as to have this person. He has twenty years of complex litigation practice. He has been the chairman of his environmental law and litigation section at Latham and Watkins, which is one of those sort of great stratospheric law firms that would never hire me or even interview me when they saw my resume when I graduated from law school.

He's the former chairman of the Board of Environmental Law Institute, which is a think-tank in Washington which has done a lot of really valuable stuff in the way of the environment. I have seen and read his work with the EPA issues. I've checked around with a lot of the people who have been involved in complex negotiations and by hiring him, I believe I made a good decision.

Now, why put him in charge of water rights in this committee. Well, I've got to tell you something that I learned when I was a young lawyer and that is you always go for the best. If you're serious about working problems, you go for the best, and the best is about experience, about negotiating skills, about enormous courtroom competence, about those kinds of skills. They're important and I just want to tell you that if I, if it were my rights at stake, that's the kind of lawyer I'd hire.

And I'd hire somebody who had a long resume, saying I participated in western water adjudications. That's my resume. I've participated in half the water adjudications in the West. I wouldn't hire Bruce Babbitt for this job ever. I'd rather hire a real lawyer and I think I got one. And as long as it's my responsibility, that's the way I'm making decisions. Now, should you all get to know him? Yes. Should he do lots of consultations? Yes. Should we all try to bond together and move on and make this work? Absolutely positively, yes.

Now, lastly a word about Don Glaser and all of his chair and her friends in this Western Policy Review. This is an opportunity that I hope—and I'm really addressing this to Don. I've got a bone to pick with him because I promised him a good job in Colorado when he got tired of doing water issues, and I said, "Don, I'll do something I've never done before. I will take somebody from the Bureau of Reclamation and I will make you a state director of the Bureau of Land Management in Colorado." He rewarded me by leaving a year later, and I've always held that against him.

Now, he can redeem himself in my eyes and for all of you by putting some real fire power into this report. This report cannot be, "We need more money." Don, we all know that. We all know that, and we do need more money, but we need a lot of other things, and we need some imagination.

And we need you to draw on your experience and all of your friends to put some real fire power into that report because it could make a difference. Okay, I was going to give a short defensive talk but I think I've now said enough. Thank you very much.